Supreme Court of the United States

No.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS OR TO THE ILLINOIS APPELLATE COURT, SECOND DISTRICT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

DORR ANDERSON and DOROTHY ANDERSON, his wife; MONT L. ANDERSON and WANDA LEE ANDERSON, his wife; WILLIAM LINGENFELTER and BETTY LINGENFELTER, his wife; and KENNETH J. CHANCE and BETTY CHANCE, his wife;

Petitioners,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES OF McHENRY COUNTY, ILLINOIS,

Respondent.

DORR ANDERSON and DOROTHY ANDERSON, his wife; MONT L. ANDERSON and WANDA LEE ANDERSON, his wife; WILLIAM LINGENFELTER and BETTY LINGENFELTER, his wife; and KENNETH J. CHANCE and BETTY CHANCE, his wife;

Petitioners,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES OF McHENRY COUNTY, ILLINOIS, a corporation; BOARD OF EDUCATION OF McHENRY COUNTY COMMUNITY HIGH SCHOOL, DISTRICT No. 156, OF THE CITY OF McHENRY, a municipal corporation; VERNON W. KAYS, County Clerk of McHenry County; HARRY C. HERENDEEN, County Treasurer of McHenry County; STANLEY H. CORNUE, County Supervisor of Assessments of McHenry County; and LESTER R. BACON, Assessor, McHenry Township, McHenry County;

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS OR TO THE ILLINOIS APPELLATE COURT, SECOND DISTRICT.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Dorr Anderson and Dorothy Anderson, his wife, Mont L. Anderson and Wanda Lee Anderson, his wife, William Lingenfelter and Betty Lingenfelter, his wife, and Kenneth J. Chance and Betty Chance, his wife, pray that a writ of certiorari issue to review the decision of the Supreme Court of Illinois dismissing their appeal as a matter of right to that court and to review the dismissal of their appeal pending in the Illinois Appellate Court Second District on transfer from the Supreme Court of Illinois and to review the order of transfer and to review the judgment order of the Circuit Court of McHenry County, Illinois, dated August 2, 1957, and the orders of that court dated May 1, 1959, and July 7, 1959, striking petitions to vacate that judgment order.

OPINIONS BELOW.

No opinions have been written.

JURISDICTION.

The order of the Illinois Appellate Court Second District dismissing an appeal transferred to that court by the Supreme Court of Illinois was entered on December 9, 1959, and became final on February 1, 1960, upon expiration of the term, while a motion to vacate the order of dismissal was still pending. The order of the Supreme Court of Illinois dismissing an appeal to that court, taken as a matter of right, and an order of that court striking a petition for leave to appeal, were entered on March 30, 1960. The time for filing a petition for writ of certiorari was extended by Mr. Justice Clark to June 28, 1960 on May 4, 1960, to cover a possible writ of certiorari to the Appellate Court. No terms were attached.

The jurisdiction of this court is invoked under 28 U.S.C. 1257(3); 28 U.S.C.A. 1257(3).

QUESTIONS PRESENTED.

1.

Whether a judgment in an eminent domain proceeding in a state court is invalid and interlocutory and deprives the owners of the land condemned of their property or of its possession and use without just compensation and without due process of law in violation of their federal rights under the 14th Amendment to the Constitution of the United States, which purportedly condemns an entire subdivision of thirty-six nonuniform lots and land dedicated to public use as one parcel at a certain value and authorizes the condemning body to take possession of the premises upon payment of that amount to a public official who is designated by statute to receive it for the benefit of the persons entitled thereto, where before the suit was filed three of the lots had been sold on contract, the down-payments had been made, and the contracts had been recorded, and the judgment does not determine the value of each lot sold on contract and the value of each interest therein and the aggregate value of the other lots and the value of the dedicated land or the aggregate value of the other lots and the dedicated land, leaving it to the owners themselves to make such determinations without any judicial assistance whatsoever, and the condemning body has paid the money to the public official designated and has taken possession of the premises.

2.

Assuming an affirmative answer to the first question, Whether the State of Illinois has not in substance and effect deprived petitioners of their federal rights under the 14th Amendment to the Constitution of the United States by putting forward non-federal grounds of decision without opinion that are without fair and substantial sup-

port, *i.e.*, that are clearly untenable, in order to bar appellate review and force petitioners to waive their constitutional rights, state and federal, and their statutory and common law rights, and to consolidate their claims, and to accept the money deposited with the county treasurer, and to divide the money between themselves without judicial evaluation and decision, in order that the courts and the School Trustees may be relieved from the embarrassing position in which they find themselves without a final and a valid judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the 14th Amendment (Appendix 1a), Article II, Section 13 of the Constitution of the State of Illinois (Appendix 1a), and the Illinois Eminent Domain Act (Appendix 1a-12a) and the Illinois Civil Practice Act (Appendix 14a-16a). Other Illinois statutes which are not of crucial importance but are referred to in the Petition are also set out in the Appendix. All references to Illinois Statutes are to either Illinois Revised Statutes 1955 or Illinois Revised Statutes 1959. The statutes include the Constitution of the United States and the Constitution of Illinois and the Rules of Court.

STATEMENT.

On November 14, 1956, the County Board of School Trustees of McHenry County, Illinois, hereinafter called the School Trustees, filed a petition to condemn Anderson's Addition to the City of McHenry, Illinois for the benefit of the Board of Education of McHenry County Community High School, District No. 156, of the City of McHenry and State of Illinois (Sup. Ct. Ill. Case No. 35793, Rec. p. 4, Supp. Abs. 8). It named as parties defendant Dorr Anderson and Dorothy Anderson, his wife, Mont L. Anderson and Wanda Lee Anderson, his wife,

Kenneth J. Chance and Betty Chance, his wife, and William Lingenfelter and Betty Lingenfelter, his wife, and Unknown Owners (Supp. Abs. 8).

Petitioners Dorr Anderson and Dorothy Anderson, his wife, were the owners of the subdivision when it was subdivided (Supp. Abs. 4). The subdivision consisted of thirty-six lots, which were not uniform, (Abs. 79) and land dedicated to public use (Supp. Abs. 5). Petitioners Mont L. Anderson and Wanda Lee Anderson, his wife, purchased Lot 7 in said subdivision on contract for $3,000.00, and made the down payment of $1,000.00 called for by the contract and the contract was recorded (Supp. Abs. 5). Petitioners William Lingenfelter and Betty Lingenfelter, his wife, purchased Lot 16 in said subdivision on contract for $3,000.00, and made the down payment of $250.00 called for by the contract and the contract was recorded (Supp. Abs. 6). Petitioners Kenneth J. Chance and Betty Chance, his wife, purchased Lot 27 in said subdivision on contract for $3,000.00, and made the down payment of $500.00 called for by the contract and the contract was recorded (Supp. Abs. 6). At all times between February 8, 1956, to and including November 13, 1956, the respective owners of the subdivided land and their titles were, parcel by parcel, (a) Lots 1 to 6 and 8 to 15 and 17 to 26 and 28 to 36, inclusive, as 33 separate parcels or 1 parcel—Dorr Anderson and Dorothy Anderson, his wife—legal title; (b) Lot 7—Mont L. Anderson and Wanda Lee Anderson, his wife—equitable title, as vendees, and Dorr Anderson and Dorothy Anderson, his wife—legal title, as vendors; (c) Lot 16—William Lingenfelter and Betty Lingenfelter, his wife—equitable title, as vendees, and Dorr Anderson and Dorothy Anderson, his wife—legal title, as vendors; (d) Lot 27—Kenneth J. Chance and Betty Chance, his wife—equitable title, as vendees, and Dorr Anderson and Dorothy Anderson, his wife—

legal title, as vendors; and (e) Anderson Drive, Sherry Street and Glenn Court—City of McHenry (Supp. Abs. 7). Petitioners were all served with summons and filed their appearances and were represented by counsel (Supp. Abs. 9).

When the case was called for trial petitioners were represented by counsel. After trial the known parties agreed on a sealed verdict but there is no record that any form of verdict was agreed upon or submitted to the jury (Supp. Abs. 13).

On August 2, 1957, a judgment order was entered on the verdict of a jury. It condemned the entire subdivision as one parcel of land for $14,500.00 [Sup. Ct. Case No. 35793, Rec. 3, Abs. 11-15] and authorized the School Trustees to take possession of the premises upon payment of that amount to the county treasurer within thirty days and proof thereof being made to the court. (Abs. 14)

The Illinois Eminent Domain Act provided that compensation for each parcel "shall be assessed separately" and required the jury to ascertain and report just compensation to each owner of and to each person interested in each parcel. Chapter 47, Section 5 and 8, Illinois Revised Statutes 1955 (Supp. Abs. 13-15).

A Post Trial Motion was filed on August 30, 1957 (Supp. Abs. 17) and was denied on September 26, 1957 (Supp. Abs. 19). The School Trustees deposited $14,500.00 with the County Treasurer and took possession of the premises (Supp. Abs. 27).

On November 21, 1957, petitioners appealed to the Supreme Court of Illinois pursuant to a provision in the Illinois Eminent Domain Act that "an appeal as in other civil cases shall lie to the Supreme Court." Chapter 47, Section 12, Illinois Revised Statutes 1955. On April 18,

1958, the Supreme Court of Illinois dismissed the appeal because the briefs were not filed on time. Within a year from the date of entry of the judgment order Petitioners filed a Petition For Leave To Appeal. On September 22, 1958, the Supreme Court of Illinois denied the Petition For Leave To Appeal (Supp. Abs. 21).

Convinced that the judgment order of August 2, 1957, was neither valid nor final and appealable, three sets of Petitioners filed a Petition on January 30, 1959, to vacate the judgment order of August 2, 1957 (Supp. Abs. 2), and raised the question that they had been deprived of their property without just compensation and without due process of law in violation of their Federal rights under the 14th Amendment to the Constitution of the United States, Section 1 because the unsold lots constituted one parcel of land and each lot sold on contract constituted another and in condemning the entire subdivision as one parcel and in not requiring the jury to ascertain and report just compensation to each owner of and to each person interested in each parcel the Court failed to perform its judicial duty and function and left it to the owners themselves to assess each parcel separately and to ascertain and report just compensation to each owner of and to each person interested in each parcel which it had no power to do.

The Petition spelled the matter out as follows:

27. The verdict and judgment are null and void and of no effect by reason of the fact the verdict does not award and the judgment does not require any compensation to be paid to the owner or owners of each parcel of land to be condemned, *i.e.*, (1) each or all unsold lots in Anderson's Addition to the City of McHenry, (2) Lot 7 of said subdivision sold to the Mont Andersons, (3) Lot 16 in said subdivision sold to the Lingenfelters, (4) Lot 27 in said subdivision sold to the Chances, (5) the streets owned by the City of McHenry in said subdivision, in

violation of Chapter 47, Section 5 (2), Ill. Rev. Sts., 1955, which provides that the compensation for each parcel shall be separately assessed, and if enforced it would deprive the defendants of their property without due process of law in violation of their rights under Article 2, Section 2, of the Constitution of the State of Illinois, and in violation of their Federal rights under the 14th Amendment to the Constitution of the United States, Section 1, and without just compensation in violation of Article II, Section 13, of the Constitution of the State of Illinois and Article 2, Section 2 of the Constitution of the State of Illinois and of their Federal rights under the 14th Amendment to the Constitution of the United States, Section 1, because no rule is given and none exists by which the proportionate shares of each owner in the award, *i.e.*, just compensation, can be ascertained so that the award fixes no rights and binds no one and has no effects whatsoever.

28. The verdict and judgment aforesaid are null and void and of no effect because each of the defendant owners of each parcel of land sought to be condemned has a procedural right guaranteed by Article II Section 13 of the Constitution of the State of Illinois that "Private property shall not be taken or damaged for public use without just compensation" and "Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law," pursuant to which Section 1 of the Act of April 10, 1872, was enacted prescribing that "Private property shall not be taken or damaged for public use without just compensation" and "Such compensation shall be ascertained by a jury, as hereinafter prescribed" and Section 5 of the Act of April 10, 1872, was enacted prescribing "Any number of separate parcels of property, situated in the same county, may be included in one petition, and the compensation for each

shall be assessed separately by the same or different juries, as the court or judge may direct," so that assessment of just compensation for each parcel by one jury at one time rather than by multiple juries or by a court sitting without a jury or by administrative remedy is due process of law in eminent domain proceedings in the State of Illinois without which no person shall be deprived of property in such proceedings without violating Article II Section 2 of the Constitution of the State of Illinois and Amendment XIV Section 1 of the Constitution of the United States, which procedural right has been violated because there is no way in which the value of each parcel of real estate in the subdivision sought to be condemned can be determined under said verdict and judgment without another jury passing on the question of value or by a court sitting without a jury passing on the question or by an administrative tribunal passing on the question none of which are provided for under the constitutional, statutory and common law of Illinois, and by none of which is it possible to guarantee each defendant owner of each parcel would receive what the first jury would have awarded for his particular title to or interest in his particular parcel had it returned a proper verdict. (Supp. Abs. 13-16). The Petitions also asserted that the judgment order of August 2, 1957, was neither final nor appealable by reason of Section 50(2) of the Illinois Civil Practice Act (Chapter 110, Section 50(2) Illinois Revised Statutes 1955) which provide: "If multiple parties or multiple claims for relief are involved in an action, the court may enter a final order, judgment or decree as to one or more but fewer than all of the parties or claims only upon an express finding that there is no just reason for delaying enforcement or appeal. In the absence of that finding, any order, judgment or decree which adjudicates fewer than all the

claims or the rights and liabilities of fewer than all the parties does not terminate the action, is not enforceable or appealable, and is subject to revision at any time before the entry of an order, judgment or decree adjudicating all the claims, rights and liabilities of all the parties" (Supp. Abs. 16-17).

On February 13, 1959, the School Trustees filed a motion to strike the Petition (Supp. Abs. 36-44) and on May 1, 1959, their motion was allowed and it was stricken (Supp. Abs. 47). On June 1, 1959, the petitioners involved filed a motion to vacate the order striking their Petition (Supp. Abst. 47). On July 7, 1959, the remaining Petitioners also filed a Petition to vacate the judgment order of August 2, 1957, which, except for lot and parties, was identical with the Petition filed January 30, 1959 (Supp. Abs. 52). It was stricken on motion on the same day. The written motion filed June 1, 1959 (Supp. Abs. 54), and an oral motion made July 7, 1959, to vacate the order entered on that day, were denied on the latter date (Supp. Abs. 54) (Ill. Sup. Ct. Case No. 35780, Rec. p. 56).

All the Petitioners then joined in an oral motion for the Court to determine ownership of the $14,500.00 on deposit with the County Treasurer and it was denied on the same day (Supp. Abs. 55).

On July 31, 1959, Petitioners appealed to the Supreme Court of Illinois (Supp. Abs. 56). The School Trustees filed a motion to dismiss the appeal (App. Ct. Abs. 38). On September 24, 1959, that motion was denied but the Court on its own motion transferred the cause to the Illinois Appellate Court Second District (Ill. Sup. Ct. Case No. 35793, Rec. p. 5, App. Ct. Abs. 1, 38). On September 29, 1959, part of the record was transferred to the Appel-

late Court. On October 29, 1959, an order was entered in the Supreme Court on Petitioners' motion transferring the rest of the record to the Appellate Court (App. Ct. Abs. 40).

The rest of the record was filed in the Appellate Court on November 3, 1959. Abstracts and briefs were filed in the Appellate Court on or before December 3, 1959. Abstracts and briefs were due to be filed under Rule 9 of the Appellate Court "on or before 30 days after the filing of the record on appeal" (Chapter 110 Section 201.9(2) Illinois Revised Statutes 1959). On December 9, 1959, the Appellate Court dismissed the appeal "for failure to file abstract and brief as required by Rule 9" (App. Ct. Abs. 18).

On January 4, 14, 18, 30, 1960, petitions filed motions to vacate the order of December 9, 1959, and subsequent orders denying previous motions, and to reinstate the case (App. Ct. Abs. 18, 31, 32, 38). The motions contended that a record is an entirety and that it was filed in the Appellate Court on November 3, 1959 (App. Ct. Abs. 24) and that the abstracts and briefs had been filed in time in strict compliance with Rule 9. In the motion filed January 4, 1960, Petitioners claimed "That the order of this Court dismissing the appeal will, unless vacated, deprive the appellants of their right to appellate review without due process of law by state action in violation of . . . the 14th Amendment, Section 1, of the Constitution of the United States" (App. Ct. Abs. 19). In their motion filed January 14, 1960, Petitioners prayed: "that the Court will grant the relief above requested on the ground that Rule 9 of the Illinois Appellate Court, Second District, as construed and applied by the Illinois Appellate Court, Second District, in its order of December 9, 1959, and January 9, 1960, is a violation of . . . the

Fourteenth Amendment, Section 1, of the Constitution of the United States in that it requires the filing of abstracts and briefs before and without the filing of a complete record in the cause in a situation in which the appellants have no control over the record and in violation of Section 86 of the Civil Practice Act and Supreme Court Rule 47" (App. Ct. Abs. 31). All motions but the last were denied. The October Term 1959 expired February 1, 1960 (App. Ct. Abs. 41). The last motion was stricken February 5, 1960 (App. Ct. Abs. 41). On February 25, 1960, Petitioners appealed to the "Supreme Court of Illinois as a matter of right from the order of the Illinois Appellate Court Second District entered on December 9, 1959, dismissing the appeal 'for failure to file abstracts and briefs as required by rule 9', and from each order entered in said cause thereafter, including the order entered herein denying the motion filed on January 30, 1960, the case involving the validity of a statute, *i. e.*, Rule 9, and the question having arisen for the first time in the Appellate Court", and prayed that the Supreme Court would "declare that Rule 9 is either unconstitutional or has been improperly construed by the Illinois Appellate Court Second District and reverse and remand the cause to that Court with directions to vacate its order dismissing the appeal and all orders entered subsequent thereto and to require Appellees to answer their briefs by a date fixed by the Court" (App. Ct. Abs. 42). The record was filed in the office of the Clerk of the Supreme Court of Illinois on March 9, 1960, as Case No. 35780. On March 12, 1960, Petitioners filed a Petition For Leave To Appeal in the office of the Clerk of the Supreme Court of Illinois, as Case No. 35793. (Sup. Ct. Ill. Case No. 35793, Rec. p. 2) It raised two constitutional questions. It stated that "Rule 9 of the Illinois Appellate Court Second District as construed and

applied by the Illinois Appellate Court Second District in its order of December 9, 1959, and subsequent orders, is a violation of . . . the 14th Amendment Section 1 of the Constitution of the United States in that it requires the filing of abstracts and briefs before and without the filing of a complete record in the cause in a situation in which the litigants have no control over the record and in violation of Section 86 of the Civil Practice Act and Supreme Court Rule 47" (Pet. 19) pointing out that "this point was raised in the motion filed January 14, 1960, paragraph 4 pages 1 and 2, and was decided adversely to petitioners by the Appellate Court when it denied the motion." It also claimed: "The order of December 9, 1959, dismissing the appeal and the subsequent orders refusing to vacate it have deprived petitioners of their right to appellate review without due process of law by state action in violation of . . . the 14th Amendment Section 1 of the Constitution of the United States" pointing out "this point was raised in the motion filed January 2, 1960, paragraph 1(d) page 2 and was decided adversely to petitioners by the Appellate Court when it denied that motion" (Pet. 20).

The School Trustees filed a motion to dismiss the appeal on the ground Rule 9 of the Appellate Court is not a statute, and appellants did not file a petition for rehearing in the Appellate Court (Rec. 35780 p. 31, p. 35). Petitioners filed objections to the motion on the ground rule 9 was a statute citing *Diversey Liquidating Corp.* v. *Neunkirchen*, 1939, 370 Ill. 523, and *People* v. *Calloy*, 1934, 358 Ill. 11, 23 (Rec. 35780 pp. 47, 50), to rebut the first proposition and *Village of North Chicago* v. *The American Steel and Wire Company*, 231 Ill. 539, to rebut the second proposition (Rec. 35780 p. 48). On March 30, 1960, the Court granted the motion to dismiss the appeal

(Rec. 35780 p. 31). On March 16, 1960, the School Trustees filed a motion to strike the petition for leave to appeal on the ground that it was not filed within 40 days following the entry of the order of the Appellate Court dismissing the appeal and no petition for rehearing had ever been filed in the Appellate Court (Rec. 35793 p. 9). On March 30, 1960, the Court granted the motion to strike the petition for leave to appeal (Rec. 35780 p. 33). Time for filing a Petition For Writ Of Certiorari to the Illinois Appellate Court, Second District, will expire on June 28, 1960, Mr. Justice Clark on May 4, 1960 having entered an order extending time for filing it until then, and to the Supreme Court of Illinois on the same date.

ARGUMENT.

POINT I.

THE COURT ERRED IN NOT GRANTING THE POST TRIAL MOTION AND THE PETITIONS THAT AMENDED IT BECAUSE THE VERDICT AND JUDGMENT ARE NULL AND VOID AND OF NO EFFECT BECAUSE THEY DEPRIVE THE DEFENDANTS OF THEIR PROPERTY OR OF ITS POSSESSION AND USE WITHOUT DUE PROCESS OF LAW IN VIOLATION OF AND WITHOUT JUST COMPENSATION IN VIOLATION OF THE 14th AMENDMENT, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES.

Due process of law in Eminent Domain proceedings is determined by Article II Section 13 of the Constitution of 1870 and the Eminent Domain Act and the Civil Practice Act and the Common Law and the 14th Amendment Section 1 to the Constitution of the United States.

The Constitution of 1870 and the Eminent Domain Act both provide that private property shall not be taken

for public use without just compensation and the same protection is afforded by the 14th Amendment. *Chicago, B. & Q. R. Co. v. City of Chicago*, 1897, 166 U.S. 226, 241, 17 S.Ct. 581, 586. That case is determinative of petitioners right to seek review of the judicial proceedings in the Supreme Court of Illinois, the Illinois Appellate Court Second District, and the Circuit Court of McHenry County. This Court quoted with approval the statement in 2 Story, Const., Section 1956:

> "Due process of law requires—First, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be be assessed; and, second, that parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection or in the interest of the property owner, except as he may see fit voluntarily to waive them."

This Court then stated:

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the Constitution of the United States, and affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

In *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463, this Court stated the basic principle that "no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner."

In *Chicago & Northwestern Railway Co.* v. *Galt*, 1890, 133 Ill. 657, 668, 674, 23 N. E. 425, 527, 674, the Court quoted with approval the following statement made in Lewis on Eminent Domain:

> "The jurisdiction exercised in condemnation cases is always of a special character. The proceedings are to be conducted according to a certain prescribed mode. It is plain, therefore, that, even after the court or tribunal has acquired jurisdiction in the case, errors may be committed which will render the proceeding void. The jurisdiction acquired is simply a jurisdiction to proceed to final determination of the case in the mode provided by law. Any material departure from that mode will be fatal to the proceedings."

The original plat of Anderson's Addition to the City of McHenry was recorded on January 31, 1956. It made each lot in the subdivision a separate parcel of land for purposes of condemnation. *Wilcox* v. *St. Paul & Northern Pacific Railway Co.*, 1886, 35 Minn. 439, 442; *Harper* v. *St. Paul & Northern Pacific Railway Co.*, 1890, 42 Minn. 340, 341; and *Oregon R. & Nav. Co.* v. *Toffe*, 1913, 67 Ore. 102, 113. Three lots were sold on contract in 1956. That placed equitable title to the lots in the purchasers. *Wahl* v. *Fairbanks*, 405 Ill. 290, 293-4. It also made each lot sold on contract a separate parcel of land for purposes of condemnation. *Public Service Co.* v. *Develop Co.*, 1926, 101 W. Va. 165, 174; *Brennan* v. *City of St. Paul*, 1890, 44 Minn. 464.

The plat conveyed a fee simple title to Anderson Drive, Sherry Street, and Glenn Court, which are "marked or noted on such plat as donated or granted to the public" because they are "intended for" a "street, alley, way, common or other public use" to the City of McHenry. (Defendants' Exhibit 1, Abs. 79; admitted, Abs. 40) (Ch. 109

Sec. 3 Illinois Revised Statutes 1955). The Dorr Andersons had the power "at any time before the sale of any lot therein" to vacate the plat "by written instrument" "approved by the city council", which had power "to reject any such instrument which abridges or destroys any public rights in any of its streets or alleys". (Ch. 109 Section 6 Illinois Revised Statutes 1955) After the lots were sold the plat could only be vacated "by all the owners of lots in such plat joining in the execution of such writing." (Chapter 109 Section 6 Illinois Revised Statutes 1955)

Four or five parcels of land were involved: (1) all unsold lots, (2) the lot sold to the Mont Andersons, (3) the lot sold to the Lingenfelters, (4) the lot sold to the Chances, and (5) the streets owned by the City of McHenry. Cf. Ch. 120, Sections 501(1), 515, 518, 523, and 748 Illinois Revised Statutes 1955. "Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings. One of these is that a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of part or all of it." *United States* v. *Miller*, 1942, 317 U.S. 369, 375-6, 63 S. Ct. 276, 281. None of the lots were separately evaluated. The proceedings therefore violated Chapter 47 Section 5(2) Illinois Revised Statutes 1955 which provides that the compensation for each parcel shall be separately assessed, and they are null and void and of no effect. *Brennan* v. *City of St. Paul*, 1890, 44 Minn. 464; *Rusch* v. *Milwaukee, Lake Shore & Western R.R.*, 1882, 54 Wis. 136, 138. The reason is that no rule is given and none exists by which the proportionate share of each owner in the award, *i.e.*, just compensation, can be ascertained, so that the award fixes no rights and binds no one and has no effect whatsoever. *Brennan* v. *City of St. Paul*, 1890, 44 Minn. 464; *Rusch* v. *Milwaukee, Lake Shore & Western Ry. Co.*, 1882, 54 Wis. 136, 138.

The Eminent Domain Act provides:

> "Any number of separate parcels of property * * * may be included in one petition, and the compensation for each shall be assessed separately by the same or different juries. * * *." Sec. 5.

At least five separate parcels of property were included in the petition filed in this case to condemn Anderson's Subdivision and the compensation for none of them was separately assessed.

The Eminent Domain Act provides:

> "When the jury shall have been so selected, the court shall cause the following oath to be administered to said jury: You and each of you do solemnly swear that you will well and truly ascertain and report just compensation to the owner (and each owner) of the property which it is sought to take or damage in this case, and to each person therein interested, according to the facts in the case, as the same may be made to appear by the evidence, and that you will truly report such compensation so ascertained: so help you God." Sec. 8.

Under the School Trustees' theory of the case eight known owners of or persons interested in Anderson's Subdivision and Unknown Owners were parties to the action. Under defendants' theory of the case four known owners of or persons interested in each of three lots, two known owners of or persons interested in the other lots involved, were parties to the action, and the City of McHenry (unless included as an Unknown Owner) should have been a party to the action but was not. But the jury did not ascertain or report just compensation to each owner or set of joint owners or to each person or set of persons interested in the subdivision as a whole, or to each owner or set of joint owners of or to each person or set of per-

sons interested in each parcel involved, or to each owner or set of joint owners of or to each person or set of persons interested in each lot involved.

The Eminent Domain Act further provides:

> "Said jury shall * * * after hearing the proof offered make their report in writing * * * so as to clearly set forth and show the compensation ascertained to each person thereto entitled, and the said verdict shall thereupon be recorded: * * *." Sec. 9.

The jury reported in writing but the report did not set forth and show the compensation ascertained to each person thereto entitled or to each set of persons thereto entitled.

The Eminent Domain Act further provides:

> "* * * the judge or court, upon such report * * * shall proceed to adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property and the use of the same upon payment of full compensation as ascertained as aforesaid, within a reasonable time to be fixed by the court, and such order, with evidence of such payment, shall constitute complete justification of the taking of such property * * *." Sec. 10.

But payment of full compensation "as ascertained as aforesaid" is impossible because it was not "ascertained as aforesaid", *i.e.* in the manner prescribed, so the condition upon which the court could proceed to adjudge and make an order ordering that petitioner enter upon such property and the use of the same and upon the meeting of which payment of compensation would constitute complete justification for the taking of such property could never have been met, and the court's order was beyond the power of the court to enter and null and void and of

no effect for want of jurisdiction in the court to enter it. *Armstrong* v. *Obucino*, 300 Ill. 140, 143; *Thayer* v. *Village of Downers Grove*, 369 Ill. 334, 339.

The Eminent Domain Act further provides:

> "Payment of the final compensation adjudged * * * may be made in all cases to the county treasurer, who shall, on demand, pay the same to the party thereto entitled, taking receipt therefore, or payment be made to the party entitled, his, her or their conservator or guardian * * *." Sec. 14.

But when the compensation awarded is not "ascertained as aforesaid" and assessed parcel by parcel and to each owner or set of joint owners or to the person or set of persons interested in each parcel, the county treasurer on demand is unable to pay the same to the party thereto entitled because he has no way of knowing who is entitled to receive it. And, of course, under such circumstances, it could never be the final compensation adjudged because it must be readjudicated.

It follows, from what has been said, that defendants' Constitutional rights, State and Federal, have been violated in these proceedings to take their property away from them and that the proceedings are null and void and of no effect.

The verdict and judgment are null and void and of no effect by reason of the fact the verdict does not award and the judgment does not require any compensation to be paid to the owner or owners of each parcel of land sought to be condemned, *i.e.* (1) each or all unsold lots in Anderson's Addition to the City of McHenry, (2) Lot 7 of said subdivision sold to the Mont Andersons, (3) Lot 16 in said subdivision sold to the Lingenfelters, (4) Lot 27 in said subdivision sold to the Chances, (5) the streets owned by the City of McHenry in said subdivision, in vio-

lation of Chapter 47, Section 5(2), Ill. Rev. Sts. 1955, which provides that the compensation for each parcel shall be separately assessed, and if the judgment were enforced it would deprive the defendants of their property without due process of law in violation of their rights under Article 2, Section 2, of the Constitution of the State of Illinois, and in violation of their Federal rights under the 14th Amendment to the Constitution of the United States, Section 1, and without just compensation in violation of Article II, Section 13, of the Constitution of the State of Illinois and Article 2, Section 2, of the Constitution of the State of Illinois and of their Federal rights under the 14th Amendment to the Constitution of the United States, Section 1, because no rule is given and none exists by which the proportionate shares of each owner in the award, i.e., just compensation, can be ascertained so that the award fixes no rights and binds no one and has no effects whatsoever.

The verdict and judgment aforesaid are null and void and of no effect because each of the defendant owners of each parcel of land sought to be condemned has a procedural right guaranteed by Article II Section 13 of the Constitution of the State of Illinois that "Private property shall not be taken or damaged for public use without just compensation" and "Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law," pursuant to which Section 1 of the Act of April 10, 1872, was enacted prescribing that "Private property shall not be taken or damaged for public use without just compensation" and "Such compensation shall be ascertained by a jury, as hereinafter prescribed", and Section 5 of the Act of April 10, 1872, was enacted prescribing "Any number of separate parcels of property, situate in the same county, may be included in one

petition, and the compensation for each shall be assessed separately by the same or different juries, as the court or judge may direct", so that assessment or just compensation for each parcel by one jury at one time rather than by multiple juries or by a court sitting without a jury or by administrative remedy is due process of law in eminent domain proceedings in the State of Illinois without which no person shall be deprived of property in such proceedings without violating Article II, Section 2 of the Constitution of the State of Illinois and Amendment XIV, Section 1 of the Constitution of the United States, which procedural right has been violated because there is no way in which the value of each parcel of real estate in the subdivision sought to be condemned can be determined under said verdict and judgment without another jury passing on the question of value or by a court sitting without a jury passing on the question or by an administrative tribunal passing on the question none of which are provided for under the constitutional, statutory and common law of Illinois, and by none of which is it possible to guarantee each defendant owner of each parcel would receive what the first jury would have awarded for his particular title to or interest in his particular parcel had it returned a proper verdict.

The substantive constitutional right to receive just compensation parcel by parcel and the procedural constitutional right to have it ascertained by a jury parcel by parcel have not been waived, the first because waiver is based on implied consent and consent cannot be implied short of circumstances showing an intention on the part of the owner or owners of each parcel take to give their property to the public without any compensation whatsoever, and the second because the procedure is necessarily mandatory in order to be certain for the mutual benefit of the

public and the owner or owners of each parcel sought to be condemned and it is impossible to determine in any other way that the compensation to be paid is just to both because the defendants were under no duty to aid the petitioner in condemning their real estate by objecting to the procedure followed by the Court.

POINT II.

THE COURT ERRED IN NOT GRANTING THE POST TRIAL MOTION AND THE PETITIONS THAT AMENDED IT BECAUSE THE JUDGMENT ORDER OF AUGUST 2, 1957, IS NOT A FINAL ORDER BECAUSE IT DOES NOT DETERMINE THE VALUE OF EACH PARCEL OF LAND SOUGHT TO BE CONDEMNED AND ITS OWNERSHIP AND THE AMOUNT OF COMPENSATION TO BE PAID TO EACH OWNER OR OWNERS THEREOF, ADJUDICATING FEWER THAN ALL THE CLAIMS OR THE RIGHTS AND LIABILITIES OF FEWER THAN ALL THE PARTIES, WITHOUT MAKING AN EXPRESS FINDING THAT THERE IS NO JUST REASON FOR DELAYING ENFORCEMENT OR APPEAL OF SAID JUDGMENT ORDER, AND IT IS SUBJECT TO REVISION AT ANY TIME.

Section 12 of the Eminent Domain Act provides that:

"In all cases . . . an appeal as in other cases shall lie to the Supreme Court."

It grants an appeal and designates the court to which it may be taken but refers us to the general law regulating the subject of appeals, the Civil Practice Act, for particular rules governing the situation. Section 1 of the Civil Practice Act provides that in eminent domain proceedings

"the separate statutes control to the extent to which they regulate procedure, but this Act applies as to matters of procedure not so regulated by separate statutes."

The Civil Practice Act, therefore, governs the appeal in the absence of any provision in the Eminent Domain Act that changes the situation.

Section 50(2) of the Civil Practice Act was copied after Rule 54b of the Federal Rules. The parent rule was held applicable in a condemnation suit in *Town of Clarksville, Va.* v. *United States*, (1952), 198 F. 2d 238. The precise issue was whether the condemnee-town's two claims for additional compensation were separate claims from the rest of the condemnation award so that an order rejecting them, accompanied by the district court's certificate that there "is no just reason for delay and upon an express direction for the entry of judgment" (Rule 54b), was final and appealable, or whether it constituted a partial adjudication of a single claim, which must await the final conclusion of the action. The court resolved the issue in favor of multiple claims and appealability. The court said:

> "the District Court has complied with Rule 54(b) by issuing an order determining that there is no just reason for delay and expressly directing entry of final judgment upon the two claims, and we think there is now jurisdiction to consider the appeal."

Certiorari was denied, 344 U.S. 927, 97 L. Ed. 714, 73 Sup. Ct. 495.

The purpose of an eminent domain case is fourfold: to take title to the property condemned away from the owners and persons interested therein and place it in the condemning body; to ascertain the value of each parcel of real estate taken and to determine the value of each interest therein; to ascertain to whom the compensation shall be paid; and to see that it is paid to them. And to accomplish those purposes it contains certain important provisions to protect the property owner from having his property confiscated without any or just compensation.

In brief, the Eminent Domain Act provides that the compensation for each parcel shall be assessed separately by a jury; the jury shall report just compensation to each owner or owners of each parcel it is sought to take, and to each person therein interested; the report must clearly set forth the compensation ascertained to each person thereto entitled; and the court has no jurisdiction to enter any order ordering that the petitioner enter upon such property and the use of the same except upon payment of full compensation "as ascertained as aforesaid" to the county treasurer, who shall, on demand pay the same to the party thereto entitled. In this case none of the conditions upon which the court could enter an order ordering the petitioner to take possession of the premises were ever met; each parcel of property was not separately assessed; the jury did not ascertain and report just compensation to each owner of and to each person interested in the property let alone each parcel of the property sought to be taken; the jury's report did not set forth and show the compensation ascertained to each person thereto entitled; full compensation "as ascertained as aforesaid" was never paid to the county treasurer because it was not ascertained in the prescribed manner and was not made to him in such a manner that it is payable on demand to anyone.

Section 50(2) of the Civil Practice Act provides:

> "If multiple parties or multiple claims for relief are involved in an action, the court may enter a final order, judgment or decree as to one or more but fewer than all of the parties or claims only upon an express finding that there is no just reason for delaying enforcement or appeal. In the absence of that finding, any order, judgment or decree which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not terminate the action, is not enforceable or appealable, and is subject

to revision at any time before entry of an order, judgment or decree adjudicating all the claims, rights and liabilities of all the parties."

That there are multiple parties and multiple claims in this case is evident from the complaint and the petitions filed in the cause. The judgment order of August 2, 1957, assesses the compensation to be paid to the owner or owners, person or persons interested in the real property taken as just compensation for a fee simple title thereto the sum of $14,500.00. It does not determine the just compensation to be paid for each parcel or to each owner of each parcel or to each person interested therein which remains to be done before the litigation can be terminated. Disregarding Unknown Owners (of which there are none) there are eight individual known owners of or persons interested in different parcels in the subdivision who claim a right to part of the fund deposited with the County Treasurer of McHenry County. It follows that this action involves multiple parties and multiple claims for relief, and that Section 50(2) is applicable to and governs the case unless the Eminent Domain Act provides otherwise, which it does not.

Under Section 50(2) a final order, judgment or decree can be entered in a cause involving multiple parties and multiple claims for relief only if (a) it is a final order, judgment or decree, as to all parties in the cause, or (b) the court makes an express finding that there is no just cause why the judgment should not be enforced or appealed.

Obviously, in this case, the court did not make the finding required and the judgment order of August 2, 1959, is not final and appealable by reason of that fact unless it is final in regard to all parties. The latter condition is not present because the Eminent Domain statute was not com-

plied with and the conditions under which payment to the County Treasurer were made which would make it final as to all parties were not complied with.

Section 50(6) of the Civil Practice Act merely provides that the Court may vacate any final order, judgment or decree on motion filed within 30 days from the entry thereof upon any terms and conditions that shall seem reasonable. Section 50(2) of the Civil Practice Act governs any order, judgment or decree that is not final, and it provides that such an order, judgment or decree may be vacated on motion at any time. Section 50(6) therefore is only applicable if the order, judgment or decree involved tested by the requirements of Section 50(2) is a final order, judgment or decree, *i.e.*, an order, judgment or decree that is final subject only to being divested by allowance of a Post Trial Motion filed within 30 days from the date of its entry. It follows that if an order, judgment or decree is not final under Section 50(2) of the Civil Practice Act a Post Trial Motion may be filed or amended at any time more than thirty days after the date of entry of said order, judgment or decree. That is the situation in this case.

If the event the judgment order of August 2, 1957, is final and not void, it should be vacated and set aside under Section 72(1-6) of the Civil Practice Act, because the Court was never advised by the petitioner that more than one parcel of real estate was being condemned and had it known that fact it would have tried the case in compliance with the constitutional and statutory and common law procedure applicable in taking more than one parcel of land herein set forth.

In any event the Court should have determined the amount of money due for each parcel of land condemned and the amount of money due to each defendant named in the petition to condemn.

POINT III.

THE STATE OF ILLINOIS HAS IN SUBSTANCE AND EFFECT DEPRIVED PETITIONERS OF THEIR FEDERAL RIGHTS UNDER THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY PUTTING FORWARD NON-FEDERAL GROUNDS OF DECISION WITHOUT OPINION THAT ARE WITHOUT FAIR AND SUBSTANTIAL SUPPORT, i.e., THAT ARE CLEARLY UNTENABLE, IN ORDER TO BAR APPELLATE REVIEW AND FORCE PETITIONERS TO WAIVE THEIR CONSTITUTIONAL RIGHTS, STATE AND FEDERAL, AND THEIR STATUTORY AND COMMON LAW RIGHTS, AND TO CONSOLIDATE THEIR CLAIMS, AND TO ACCEPT THE MONEY DEPOSITED WITH THE COUNTY TREASURER, AND TO DIVIDE THE MONEY BETWEEN THEMSELVES WITHOUT JUDICIAL EVALUATION AND DECISION, IN ORDER THAT THE COURTS AND THE SCHOOL TRUSTEES MAY BE RELIEVED FROM THE EMBARRASSING POSITION IN WHICH THEY FIND THEMSELVES WITHOUT A FINAL AND A VALID JUDGMENT.

This point is crucial.

It is our contention that the state courts, knowing that the trial court has blundered, and perhaps fearful of the effect recognition or public non-recognition of that fact might have on other cases, have consciously avoided reviewing the case on the merits on one pretext or another, by transferring the appeal, dismissing the appeal, and striking a petition for leave to appeal and dismissing an appeal to review the order of dismissal, on unsubstantial non-federal grounds, hidden under the cloak of no opinion, which will ultimately force petitioners to waive their federal rights under the 14th Amendment by entering into an agreement with the county treasurer as a group under which he could deliver the money on deposit to them and

they could divide it among themselves by compulsory arbitration. In other words, the Illinois courts have refused to perform their judicial function which they were created to perform and without performance of which there is no due process of law.

In *Louisiana Navigation Company, Ltd.* v. *Oyster Commission of Louisiana*, 1912, 226 U. S. 99, 102, this Court said:

> "The rule which excludes the right to review questions arising in a cause depending in a state court until a final judgment is rendered by such court involves as a necessary correlative the power and the duty in this court when a final judgment in form is rendered and the cause is brought here for review to consider and pass upon all the Federal controversies in the cause irrespective of how far it may be that by the state law such questions were concluded during the litigation and before a final judgment susceptible of review here was rendered. *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U.S. 207 214."

In *Ward* v. *Love County*, 1919, 253 U.S. 17, 22, 40 S.Ct. 419, 421, this court held that:—

> "it is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support * * * the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

In *Hancock Life Ins. Co.* v. *Carr*, 272 U.S. 494, 500, 47 S. Ct. 179, 183, this Court said:

> "It is true that the interpretations put upon such a tax law of a state by its Supreme Court is binding upon this Court as to its meaning, but it is not true that this court, in accepting the meaning thus given, may not exercise its independent judgment in determining whether, with the meaning given, its effect would not involve a violation of the federal Constitution."

This Court, therefore, has jurisdiction and a duty to inquire whether the action of the trial court in denying petitioners any relief under such circumstances by striking their petitions to vacate the judgment in the eminent domain proceedings which raised the question that the State of Illinois had in violation of their federal rights under the 14th Amendment to the Constitution of the United States deprived them of their property without due process of law or was attempting to do so and by refusing to vacate the order of striking; and the action of the Supreme Court of Illinois in transferring their appeal to the Illinois Appelate Court when the Eminent Domain Act provided appeals should lie to the Supreme Court as in other cases; and the action of the Illinois Appellate Court in dismissing their appeal for failure to file abstracts and briefs as required by Rule #9 of that Court when that rule merely provides that abstracts and briefs must be filed within thirty days after the filing of the record in the Appellate Court and they were filed within that time, and by refusing to vacate the order of dismissal on their motions to do so including a motion that the order dismissing the appeal had deprived petitioners of their right to appellate review without due process of law by state action in violation of the 14th Amendment Section 1 of the Constitution of the United States, and that the rule upon which

the court relied construed to require the filing of abstracts and briefs before the filing of a complete record was unconstitutional under the 14th Amendment Section 1 of the United States in that it requires the filing of abstracts and briefs before and without the filing of a complete record in the cause in a situation in which the litigants had no control over the record and in violation of Section 86 of the Illinois Civil Practice Act and Supreme Court of Illinois Rule 47; and the action of the Supreme Court of Illinois in dismissing their appeal taken as a matter of right on the ground that Rule 9 as construed and applied was a violation of the 14th Amendment, Section 1 in that it requires the filing of abstracts and briefs before and without the filing of a complete record in the cause in a situation in which the appellants had no control over the record and in violation of Section 86 of the Civil Practice Act and Supreme Court Rule 47, and the action of the Supreme Court in striking their petition for leave to appeal which was based on that ground the dismissal of the appeal by the Appellate Court deprived them of their right to appellate review without due process of law, the State of Illinois has deprived them of their property without due process of law in violation of their federal rights under the 14th Amendment or has attempted to do so.

"A record is an entire thing." *Crystal Ice Co.* v. *Norris, Ind.*, 1901, 61 N.E. 960, 962; *Kirby* v. *Canon*, 1857, 9 Ind. 371, 374. "Records are to be pleaded intire." 5 Jacobs Law Dictionary (1811) 399, T. E. Conlins 1st American Edition, Fry & Kammerer, Printers. "No part of a record, by itself, can have the same effect that it does when taken in connection with the whole of the record." *Vail* v. *Inlehart*, 1873, 69 Ill. 332, 335.

If a previous appeal has been taken in the same cause, it is not necessary, on the second appeal, to copy the mat

ter already embodied in the transcript on file in the appellate court and matters preceding the mandate should ordinarily be omitted. *Nashua, etc. R. Corp.* v. *Boston, etc. R. Corp.*, 61 Fed. 237, 9 C.C.A. 468. In *Harrison* v. *His Creditors*, 1891, 45 La. Ann. 91, 9 S. 15, it was held that the clerk's certificate "together with the transcript of appeal in this case already on file in the supreme court", does contain, etc., will be sufficient. See also *Allred* v. *Kennedy*, 74 Ala. 326; *Cox* v. *Osburn*, 1 A.K. Marsh (Ky.) 259; *Simmons* v. *Allison*, 119 N.C. 558, 26 S.E. 171; *Warren* v. *Fredericks*, 83 Tex. 380, 18 S.W. 750; 4 C.J. 437, n. 84.

It follows that *the record* was not filed in the Appellate Court until the transcript on the previous appeal to this Court was filed in the Court on November 3, 1959.

Once a transcript of record on appeal reaches the clerk of an appellate court, it becomes a record of the court and neither counsel for appellant nor appellee has any control over it: *Bradford* v. *Reed*, 1899, 124 N.C. 345, 346, 32 S.E. 726.

Section 86 of the Civil Practice Act provides:

> "If an appeal is taken to either the Supreme or Appellate Court and it is found or adjudged that the case was wrongfully appealed to that court, *it shall be the duty of the court* to direct the clerk to transmit *the transcript and all files therein* with the order of transfer to the clerk of the proper court. On the receipt *of the record* the clerk shall at once file the same and the case shall then proceed as if it had been taken there in the first instance . . ." (Italics ours.)

Supreme Court Rule 47 provides:

> "If any cause is appealed to this court which should have been appealed to an Appellate Court, or vice versa, it shall be transferred to the proper court of

motion, and upon an order of transfer being made *all documents already filed* shall be transmitted by the clerk to the proper court. The case shall proceed from that point in all respects as though the appeal had originally been taken to the proper court." (Italics ours.)

In *Little* v. *Smith*, 1843, 5 Ill. (4 Scam.) 400, this Court said:

> "Where the party appealing has entered into the appeal bond, and the same is accepted and approved by the justice, the appeal is taken. He has done all which the law requires of him, and what remains to be done, to wit, the return of the papers to the office of the clerk, is to be performed by the justice of the peace. In the performance of this act, which is merely ministerial, the justice is the office of the law, and not the agent of the party; and consequently the party cannot be held responsible for his neglect. We cannot but think it would be attended with hardship to take from one party the power of performing an act, and then dismiss the appeal because the act was not performed."

In *Stockbridge* v. *Martin*, 1926, 162 La. 602, 603-4, 110 So. 828, 829, the Court of Appeals, an intermediate appellate court, had adopted a rule governing records in that court, which ordered the clerk of the trial court to send the records to it "in time to be filed in that court on or before the return day." At page 604, the Court said:

> "When the case was called for the first time in the Court of Appeal, a motion was filed by the appellee to dismiss the appeal for the reason that the record was not filed in the Court of Appeal until long after the return day as fixed in the order of appeal. The motion was overruled, and that ruling is made one of the assignments of error in defendant's application for review.
>
> * * *

"That record is part of the archives of the court and is under the control of the clerk of the Court of Appeal. The duty of filing the record with the Court of Appeal is imposed upon the clerk of the district court and not upon the appellant, and the failure of the clerk to perform that duty cannot be imputed to appellant.

"The appellant in this case did everything that was expected or required of him in the perfection of his appeal. He could not know in advance that the clerk would not transmit the record before the expiration of the return day, and hence was without a legal remedy to force the clerk to perform the duty required of him in transmitting the record to the appellate court."

Appellate Court Rule 9(2) provides:

"The abstract and brief of appellant together with proof of service of copies must be filed in the clerk's office on or before 30 days after the filing of *the record on appeal*. In case either the abstract and brief is not filed within the time prescribed, the appeal or writ of error will be dismissed . . . ." (Italics ours.)

Compare Supreme Court of Illinois Rule 41(2).

A transcript was filed in the Appellate Court on September 29, 1959. It was *a record*. It was not *the record*. A transcript was filed in the Appellate Court on November 3, 1959. It was a record. It was not *the record*. But together they were *the record*. *The record*, therefore, was filed in the Appellate Court on November 3, 1959, and the abstracts and briefs were required to be filed on or before 30 days after the filing of the record on appeal, *i. e.* December 3, 1959. That deadline was met. Counsel is not aware of any rule that abstracts and briefs are due to be filed within 30 days from the filing of a *short record*.

In *Lofland* v. *Cahall*, 1921, 13 Del. Ch. 370, 374, 115 A. 458, 460, the court said:

> "The refusal of the court to dismiss the appeal because the record was not transmitted or filed in conformity with the rule necessarily disposes of appellee's motion to dismiss the appeal on account of appellants' failure to file with the clerk of this court copies of the record and copies of the briefs of counsel, because they are not required to be filed until a transcript of the record was transmitted to the court." The Appellate Court had the power to correct its error but refused to do so.

In *People ex rel Waite* v. *Briston*, 1945, 391 Ill. 101, the Court held that an order dismissing an appeal may be vacated and the appeal reinstated in the discretion of the Court during the term at which the appeal was dismissed.

Rule 9 of the Illinois Appellate Court, Second District as construed and applied by the Illinois Appellate Court, Second District in its Order of December 9, 1959, and subsequent orders is a violation of Article II, Section 2 of the Constitution of Illinois and the 14th Amendment Section 1 of the Constitution of the United States in that it requires the filing of Abstracts and Briefs before and without the filing of a complete Record in the cause in a situation in which the litigants have no control over the Record and in violation of Section 86 of the Civil Practice Act and Supreme Court Rule 47.

This point was raised in the motion filed January 14, 1960, paragraph 4 pages 1 and 2, and was decided adversely to petitioners by the Appellate Court when it denied the motion.

Rule 9 is a rule adopted pursuant to statute and in construing Rule 9 to require the preparation and filing of abstracts and briefs on the basis of an incomplete record,

incomplete through no fault of the litigants themselves, but due to a misunderstanding of the Supreme Court of Illinois or of the clerk of that Court as to what *the record* was, necessarily construed Section 85 of the Civil Practice Act and Supreme Court Rule 47 with which it could not be inconsistent and be a valid rule, and it is unconstitutional, and Section 85 of the Civil Practice Act and Supreme Court Rule 47, if they have been properly construed, are unconstitutional as being a violation of Article II Section 2 of the Constitution of the State of Illinois and the 14th Amendment Section 1 of the Constitution of the United States because it is impossible to prepare an abstract and brief without knowing what is the record on file in the office of the clerk which cannot be determined until it is filed there because nothing else is before the court but that portion of the record that has been filed and the rules are all drafted with the view that the record shall be settled first before abstracts and briefs are due to be filed as shown by the fact that the abstracts and briefs are not required to be filed even under respondent's and the Appellate Court's theory of the case unless *a record* has been filed. To require that to be done that cannot be done is not due process.

If the Appellate Court was correct in interpreting Rule 9 but it was in error in construing either Section 85 of the Civil Practice Act or Supreme Court Rule 47 the violation of due process is obvious.

A court's rule of practice which denies litigants a Constitutional right is void. *Diversey Liquidating Corporation* v. *Neunkirchen*, 1939, 370 Ill. 523. A court by its rules cannot restrict the statutory rights of the parties. 14 I.L.P. 196. It cannot adopt a rule in violation of the Rules of The Supreme Court of Illinois. *Winning* v. *Winning*, 1937, 366 Ill. 57. And its rules are subject to review by the

Court. *People ex rel Bursal* v. *Rieck*, 1950, 405 Ill. 510. Article VI Section 29 of the Constitution of Illinois provides that all laws relating to the Court shall be of uniform operation. It forbids the courts, where the practice in any respect is limited by statute, from adopting rules inconsistent with such practice. *Courson* v. *Hixon*, 1878, 91 Ill. 717.

The Order of December 9, 1959 dismissing the appeal and the subsequent orders refusing to vacate it have deprived Petitioners of their right to Appellate Review without due process of law by State action in violation of Article 2 Section 2 of the Constitution of Illinois and the 14th Amendment Section 1 of the Constitution of the United States.

"A judgment is void for want of due process where the court exceeds its jurisdiction." 16A C.J.S. 850 n. 56; 12 C.J. 1238 n. 55; 11 I.L.P. 676 n. 91; *Bond* v. *Texas & P. Ry. Co.*, 1911, 250 Ill. 376, 379. "The question of the jurisdiction of a court to render a judgment is one of due process of law." *Bond* v. *Texas & Pacific Ry. Co.*, 1911, 250 Ill. 376, 379; *G. W. Ball & Co.* v. *Boston & M. R.R.*, 1931, 344 Ill. 11, 21; 11 I.L.P. 679 n. 14.

In *Moffat Coal Co.* v. *Industrial Commission*, 1947, 397 Ill. 196, 201-2, this Court said:

> "A judgment, order or decree of a court that lacked jurisdiction or one that is void for any other reason will be reversed by this court whenever the same is brought before us by any means possible in the particular case."

This court has power to issue a writ of mandamus to an inferior court to expunge from its records an order, judgment, or decree, which is void because without jurisdiction. *People ex rel. Wood* v. *Graber*, 1946, 394 Ill. 362, 369; 14

I.L.P. 249 n. 37. See Dodd and Edmunds, Illinois Appellate Procedure, 1929, p. 141.

The Appellate Court had no jurisdiction to hold that the record was anything but the complete record or to hold that the original transcript and the second transcript together were not the record on the second appeal and to dismiss the appeal when the statutes and rules of Court had been strictly complied with.

Ordinarily a court having jurisdiction over the parties and the subject matter is under a duty to exercise its jurisdiction in a case falling within the purview thereof and cannot arbitrarily refuse to exercise jurisdiction when invoked by appropriate proceedings. 14 I.L.P. 183 n. 53. The court has no more right to decline jurisdiction which is given than to usurp that which is not given. 14 I.L.P. 183 n. 53.

Accordingly, the order of dismissal and each of the orders entered denying motions to vacate it have deprived petitioners of their right to Appellate review without due process of law.

POINT IV.

THE CONSTITUTIONAL QUESTIONS HAVE BEEN RAISED AND PASSED ON BY THE ILLINOIS COURTS AND PROPERLY PRESERVED FOR REVIEW. THE COURT SHOULD GRANT THIS PETITION FOR WRIT OF CERTIORARI BECAUSE OF THE NATIONAL IMPORTANCE OF THE QUESTIONS PRESENTED AND THE IMPORTANCE OF RIGOROUSLY REQUIRING STATE EMINENT DOMAIN PROCEDURE TO COMPLY WITH THE FUNDAMENTAL STANDARDS OF DUE PROCESS OF LAW IMPOSED BY THE 14TH AMENDMENT ON JUDICIAL PROCEDURE.

The Circuit Court of McHenry County passed on the merits of the basic constitutional question in striking the

petitions to vacate the judgment order and in denying the motions to vacate the orders striking them. The Supreme Court of Illinois in denying a motion to dismiss the appeal necessarily held the orders appealed from were final and appealable orders. The Supreme Court of Illinois in transferring the appeal to the Illinois Appellate Court on its own motion necessarily held it had no jurisdiction to review the case at that stage of the appeal. Whether it passed on the merits of the case is a matter of conjecture. The Illinois Appellate Court did not pass on the merits of the case because it dismissed the appeal on procedural grounds. The Illinois Appellate Court necessarily passed on the constitutional questions raised in that court in denying motions to vacate the order dismissing the appeal. The Supreme Court of Illinois granted a motion to dismiss the appeal and a motion to strike a petition for leave to appeal on the ground time to appeal had expired because no petition for rehearing had been filed in the Appellate Court but it rendered no opinion and in view of its decision in *Village of North Chicago* v. *The American Steel and Wire Company*, 1966, 33 Ill. 539, which held a petition for rehearing has no application under such circumstances and struck it from the files and stated that the order of dismissal could be vacated on motion made at the same term of court at which the decision on the motion was rendered it could not have based its decision in good faith upon that ground. In their motions to dismiss the appeal the School Trustees also claimed that "Rule 9" was not a statute. In view of the decision of the Supreme Court of Illinois in *Diversey Liquidating Corp.* v. *Neukirchen*, 1939, 370 Ill. 523, 19 N. E. 2d 363, holding a rule of court to be a statute, the decisions of this Court in *Williams* v. *Bruffy*, 1897, 96 U.S. 176, 183, and *Reinman* v. *Little Rock*, 1914, 237 U.S. 171, 176; and other cases that any enactment, from what-

ever source originating, to which a state gives the force of law is a statute of the state within the meaning of the statute conferring jurisdiction in this Court, could not have based its decision in good faith upon that ground. It either passed on the constitutional issue or avoided passing on it by advancing non-substantial non-federal grounds to avoid doing so, which amounts to the same thing.

The Court should grant a writ of certiorari because of the importance of the case from a nationwide viewpoint.

In *Boyd* v. *United States*, 116 U.S. 615, 635, 6 S.Ct. 524, this Court said:

> "Illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviation from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon."

In *Slattery Company* v. *United States*, 5th Cir. 1956, 231 F. 2d 37, 41, the court issued a warning that:

> "This is a period of great governmental expansion with enormously stepped up numbers of takings of private property for public use by expropriation, streamlining of the procedures for taking, and, because familiarity breeds contempt, a consequent growing and, therefore alarming attitude of complacency instead of viewing with alarm, with which government and public alike look upon the exertion of the power of eminent domain by which all that a man has can be taken from him by force."

The Supreme Court of Illinois and the Illinois Appellate Court Second District and the Circuit Court of McHenry County have not only erred in denying petitioners their constitutional rights but have repeated their error in refusing to do anything about it by procedural rulings resorted to to strangle their appeals for relief. But such unwarranted judicial acts are not limited to Illinois. This Court should issue a writ of certiorari to review the case on the merits of the constitutional questions raised to the end the complacency and contempt with which state courts are viewing the exertion of the power of eminent domain "by which all that a man has can be taken from him by force will cease".

Respectfully submitted,

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APPENDIX

Article XIV Section 1 Constitution of the United States

". . . nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

Article II Section 13 Constitution of Illinois

"Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, will be ascertained by a jury, as shall be prescribed by law . . ."

Illinois Revised Statutes 1955

Chapter 47

An Act to provide for the exercise of the right of eminent domain. (Approved April 10, 1872. L. 1871-2, p. 402.)

1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That private property shall not be taken or damaged for public use without just compensation; and that in all cases in which compensation is not made by the state in its corporate capacity, such compensation shall be ascertained by a jury, as hereinafter prescribed.

2. Where the right to take private property for public use, without the owner's consent or the right to construct or maintain any public road, railroad, plankroad, turnpike road, canal or other public work or improvement, or which may damage property not actually taken has been heretofore or shall hereafter be conferred by general law or special charter upon any corporate or municipal au-

thority, public body, officer or agent, person, commissioner or corporation and the compensation to be paid for or in respect of the property sought to be appropriated or damaged for the purposes above-mentioned cannot be agreed upon by the parties interested, or in case the owner of the property is incapable of consenting, or his name or residence is unknown, or he is a non-resident of the state, it shall be lawful for the party authorized to take or damage the property so required, or to construct, operate and maintain any public road, railroad, plankroad, turnpike road, canal or other public work or improvement, to apply to the circuit or county court of the county where the said property or any part thereof is situated, or to the judge thereof in vacation by filing with the clerk a petition, setting forth, by reference, his or their authority in the premises, the purpose for which said property is sought to be taken or damaged, a description of the property, the names of all persons interested thereon as owners or otherwise, as appearing of record, if known, or if not known stating that fact and praying such court or judge to cause the compensation to be paid to the owner to be assessed. If it appears that any person not in being, upon coming into being, is, or may become or may claim to be, entitled to any interest in the property sought to be appropriated or damaged the court shall appoint some competent and disinterested person as guardian *ad litem*, to appear for and represent such interest in the proceedings and to defend the proceeding on behalf of the person not in being, and any judgment or decree or verdict in the proceeding shall be as effectual for all purposes as though the person was in being and was a party to the proceeding. If the proceedings seek to affect the property of persons under guardianship, the guardians, or conservators of persons having conservators, shall be made parties

defendant, and if of married women their husbands shall also be made parties. Persons interested, whose names are unknown, may be made parties defendant by the same descriptions and in the same manner as provided in other cases. Where the property is sought to be taken or damaged by the state for the purpose of establishing, operating or maintaining any state house or state charitable or other state institutions or improvements, the petition shall be signed by the governor or such other person as he shall direct, or as shall be provided by law. (As amended by Act approved June 15, 1955. L. 1955, p. ..... S.B. No. 195)

2a. In any proceeding instituted by and in the name of the State of Illinois under this Act, for the purpose of acquiring title to any real property, for highway purposes, and for housing purposes provided for in the Blighted Vacant Area Development Act of 1949, enacted by the 66th General Assembly, the petitioner may file in the cause with the petition, or at any time before judgment, a declaration of taking signed by the Governor of the State of Illinois, or his duly authorized agent in that behalf, declaring that such real property is thereby taken for a public purpose of the State of Illinois. The declaration of taking shall contain or have annexed thereto the following:

(1) A statement of the public use for which such real property is taken.

(2) A description of the real property taken sufficient for the identification thereof.

(3) A statement of the estate or interest in such real property taken for said public use.

(4) A plan showing the real property taken.

(5) A statement of the amount of money estimated to be just compensation for the real property taken.

Upon the filing of the declaration of taking and of the deposition with the Clerk of the Court in which the proceeding is pending, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in the declaration, title to the real property in fee simple absolute, or such less estate or interest therein as is specified in the declaration, shall vest in the State of Illinois, and such real property shall be deemed to be condemned and taken for the use of the State of Illinois, and the right to just compensation for the same shall vest in the person or persons entitled thereto. Such compensation shall be ascertained and awarded in the proceeding and established by judgment therein, and the judgment shall include, as part of the just compensation awarded, interest at the rate of six per cent per annum on the amount finally awarded as the value of the real property from the date title vests in the State of Illinois to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the Clerk of the Court. A reasonable fee to be fixed by the Court and paid by the State of Illinois shall be allowed to the Clerk of the Court for receiving, retaining or disbursing any moneys deposited with the Clerk of the Court in accordance with this section.

Upon the application of any party in interest, and upon due notice to all parties, the Court shall order that the money deposited in the Court, or any part thereof, be paid forthwith to the person or persons entitled thereto for and on account of the just compensation to be awarded in the proceeding, without prejudice to the f

their rights of any party to the proceedings. If the compensation finally awarded shall exceed the amount of money so deposited, the Court shall enter judgment against the State of Illinois and in favor of the party or parties entitled thereto for the amount of the deficiency. If the compensation finally awarded shall be less than the amount of money so deposited and paid out, the Court shall enter judgment in favor of the State of Illinois and against the proper party or parties for the amount of the excess.

Upon the filing of the declaration of taking and the deposit with the Clerk of the Court of the estimated compensation, the State of Illinois shall thereupon have the right of entry and the parties in possession shall be required to surrender possession to the petitioner; provided, however, in case of undue hardship to the persons in possession the Court may postpone said right of entry to a day in no event later than six (6) months after the date that title vests in the State of Illinois; and provided, further, that no right of entry shall be exercised earlier than five (5) days after such vesting of title; and provided further, that the Court shall not postpone such right of entry in any case where the party in possession has received any part of the award, unless such party agrees to pay to the State of Illinois during the period of his occupancy such reasonable rental as may be fixed by the Court.

The Court shall have power to direct the payment of delinquent taxes and special assessments out of the amount determined as just compensation and to make such orders in respect of encumbrances, liens, rents, insurance, and other charges, if any, as shall be just and equitable. Amended by act filed Aug. 19, 1949, L. 1949, p. 866.

[Note: Provisions of this section for payment of estimated compensation immediately and awarding just compensation later, is in violation of Const. art. 2 §13. *Dept. of Public Works & Bldgs.* v. *Gorbe*, 409 Ill. 211, 98 N.E. 2d 739.]

2b. No appeal in any cause under this Act nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such real property in the State of Illinois. No order of the trial court or any court of review shall divest the State of Illinois of title to any property taken under this Act, except where such Court makes the finding that said property was not taken for a public use, in which event the Court shall enter such judgment as may be necessary, to compensate the person entitled thereto for the period during which the property was in the possession of the State, and to recover for the State any award paid to any person. Added by act approved July 21, 1947. L. 1947, p. 905.

2c. The right to take possession and title in advance of final judgment in condemnation proceedings as prescribed by Section 2a of this Act shall be in addition to any right, power or authority conferred by the laws of this State under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power or authority. Added by act approved July 21, 1947. L. 1947, p. 905.

3. Repealed by Act approved June 21, 1933. L. 1933, p. 586, effective Jan. 1, 1934.

4. Service of summons and publication of notice shall be made as in other civil cases. [As amended by act approved June 28, 1935. L. 1935, p. 826.]

5. No cause shall be heard earlier than twenty days after service upon defendant or upon due publication against non-residents.

Any number of separate parcels of property, situate in the same county, may be included in one petition, and the compensation for each shall be assessed separately by the same or different juries, as the court or judge may direct.

Amendments to the petition, or to any paper or record in the cause, may be permitted whenever necessary to a fair trial and final determination to the questions involved.

Should it become necessary at any stage of the proceedings to bring a new party before the court or judge, the court, or judge shall have the power to make such rule or order in relation thereto as may be deemed reasonable and proper; and shall also have power to make all necessary rules and orders for notice to parties of the pendency of the proceedings, and to issue all process necessary to the execution of orders and judgments as may be entered. [As amended by act approved June 28, 1935. L. 1935, p. 826.]

5a. In any case in which a declaration of taking has been filed as provided in Section 2a, *supra*, any defendant desiring to raise any question with respect to the validity of the taking shall do so by filing a motion to strike the declaration of taking and dismiss the suit. The motion shall be made on or before the return day mentioned in the summons or notice of publication, or within 20 days after the filing of the declaration of taking, whichever is later. Failure to file such motion within the time herein provided is a waiver of the right of any defendant to challenge the validity of the taking. Added by act filed Aug. 13, 1949. L. 1949, p. 866.

6. Repealed by Act approved June 21, 1933. L. 1933, p. 586, effective Jan. 1, 1934.

7. The petitioners and every party interested in the ascertaining of compensation, shall have the same right of challenge of jurors as in other civil cases in the circuit courts. If the panel be not full by reason of non-attendance, or be exhausted by challenges, the judge hearing such petition shall designate by name the necessary number of persons, of proper qualification, and the clerk or justice shall issue another venire, returnable instanter, and until the jury be full.

8. When the jury shall have been so selected, the court shall cause the following oath to be administered to said jury:

You and each of you do solemnly swear that you will well and truly ascertain and report just compensation to the owner (and each owner) of the property which it is sought to take or damage in this case, and to each person therein interested, according to the facts in the case, as the same may be made to appear by the evidence, and that you will truly report such compensation so ascertained: so help you God.

9. Said jury shall, at the request of either party, go upon the land sought to be taken or damaged, in person, and examine the same, and after hearing the proof offered make their report in writing, and the same shall be subject to amendment by the jury, under the direction of the court or the judge, as the case may be, so as to clearly set forth and show the compensation ascertained to each person thereto entitled, and the said verdict shall thereupon be recorded: Provided, that no benefits or advantages which may accrue to lands or property affected shall be set off against or deducted from such compensation in any case

10. Where no declaration of taking has been filed by petitioner pursuant to Section 2a of this Act, the judge or court shall, upon such report, proceed to adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property and the use of the same upon payment of full compensation as ascertained as aforesaid, within a reasonable time to be fixed by the court, and such order, with evidence of such payment, shall constitute complete justification of the taking of such property. Where a declaration of taking has been filed in the cause the judge or court shall, upon such report, proceed in accordance with Section 2a of this Act. Provided, that in case the petitioner shall dismiss said petition before the entry of such order or shall fail to make payment of full compensation within the time named in such order, that then such court or judge shall, upon application of the defendants to said petition or either of them, make such order in such cause for the payment by the petitioner of all costs, expenses and reasonable attorney fees of such defendant or defendants paid or incurred by such defendant or defendants in defense of said petition, as upon the hearing of such application shall be right and just, and also for the payment of the taxable costs. As amended by act approved July 21, 1947. L. 1947, p. 905.

11. Any person not made a party may become such by filing his cross-petition, setting forth that he is the owner or has an interest in property, and which will be taken or damaged by the proposed work; and the rights of such last named petitioner shall thereupon be fully considered and determined.

12. In all cases, in either the circuit or county court, or before a Circuit or County Judge, an appeal as in other

civil cases shall lie to the Supreme Court, except that no appeal shall lie from any order denying a motion to strike the declaration of taking and dismiss the suit, unless notice of appeal is filed within 30 days from the entry of the order, and for the purposes of such appeal such order shall be deemed to be a final order. As amended by act filed Aug. 13, 1949. L. 1949, p. 866.

13. In cases in which compensation shall be ascertained as aforesaid, if the party in whose favor the same is ascertained shall appeal such proceeding, the petitioner shall, notwithstanding, have the right to enter upon the use of the property upon entering into bond, with sufficient surety, payable to the party interested in such compensation, conditioned for the payment of such compensation as may be fully adjudged in the case, and in case of appeal by petitioner, petitioner shall enter into like bond with approved surety. Said bonds shall be approved by the judge before whom such proceeding shall be had, and executed and filed within such time as shall be fixed by said judge. Provided, however, that when the petitioner is the State of Illinois no bond shall be required. As amended by act approved June 19, 1955. L. 1955, p. 386, H. B. No. 181.

14. Should payment be made to the county treasurer, as is in the section provided, the court in the same eminent domain proceeding in which the award is determined, shall have exclusive jurisdiction to hear and determine all conflicting claims to the compensation so paid to the county treasurer, except where the parties claimant are engaged in litigation in a court have acquired jurisdiction of said party with respect to the rights in the property condemned prior to the time of such payment to the county treasurer, and payment by the county treasurer pursuant to the order of court determining such conflicting claims shall be a full acquaintance to him. Appeals may be taken from any order determining such conflicting claims as in other civil cases. As amended by act approved June 6, 1955, L. 1955, p. ..... H.B. No. 522.

15. The court or judge shall cause the verdict of the jury and the judgment of the court to be entered upon the records of said court.

16. All laws and parts of laws in conflict with the provisions of this act are hereby repealed: Provided, that this act shall not be construed to repeal any law or part of law upon the same subject passed by this general assembly; but in all such cases this act shall be construed as providing a cumulative remedy.

Illinois Revised Statutes 1959

Chapter 47

14. Payment of the final compensation adjudged, including any balance remaining due because of the insufficiency of any deposit made under Section 2.3 of this Act to satisfy in full the amount finally adjudged to be just compensation, may be made in all cases to the county

treasurer, who shall, on demand, pay the same to the party thereto entitled, taking receipt therefor, or payment may be made to the party entitled, his, her or their conservator or guardian. Should payment be made to the county treasurer, as is in this section provided, the court in the same eminent domain proceeding in which the award is determined, shall have exclusive jurisdiction to hear and determine all conflicting claims to the compensation so paid to the county treasurer, except where the parties claimant are engaged in litigation in a court having acquired jurisdiction of said parties with respect to their rights in the property condemned, prior to the time of the filing of the petition to condemn, and payment by the county treasurer pursuant to the order of court determining such conflicting claims shall be a full acquaintance to him. Appeals may be taken from any order determining such conflicting claims as in other civil cases. As amended by act approved May 20, 1959. L. 1959, p. [illegible] H.B. No. 632.

Illinois Revised Statutes, 1955

Chapter 109

Act of March 24, 1874.

3. The acknowledgment and recording of such plat, or the acknowledgment and the filing of the same as aforesaid, shall be held in law and in equity to be a conveyance in fee simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public, or any person, religious society, corporation or body politic, and as a general warranty against the donor, his heirs and representatives, to such donee or

grantee, for their use or for the use and purposes therein named or intended, and for no other use or purpose. And the premises intended for any street, alley, way, common, or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended. [As amended by act approved June 30, 1921. L. 1921, p. 677.]

6. Any such plat may be vacated by the owner of the premises, at any time before the sale of any lot therein, by a written instrument, to which a copy of such plat shall be attached, declaring the same to be vacated. Such instrument shall be approved by the city council or village or county board (as the case may be) in like manner as plats of subdivisions. Such council or board may reject any such instrument which abridges or destroys any public rights in any of its streets or alleys. Such instrument shall be executed, acknowledged or proved, and recorded, or filed, in like manner as plats of subdivisions; and being duly recorded, or filed, shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys and public grounds, and all dedications laid out or described in such plat. When lots have been sold, the plat may be vacated in the manner herein provided by all the owners of lots in such plat joining in the execution of such writing. [As amended by act approved June 30, 1921. L. 1921, p. 677.]

Illinois Revised Statutes, 1955.

Chapter 110.

Act of June 23, 1933.

1. The provisions of this Act apply to all civil proceedings, both at law and in equity, in courts of record, except in attachment, ejectment, eminent domain, forcible entry and detainer, garnishment, habeas corpus, mandamus, ne exeat, quo warranto, replevin, or other proceedings in which the procedure is regulated by separate statutes. In all those proceedings the separate statutes control to the extent to which they regulate procedure, but this Act applies as to matters of procedure not so regulated by separate statutes. As to all matters not regulated by statute or rule of court, the practice at common law and in equity prevails. As amended by act approved July 19, 1955. L. 1955, p. 2238.

26.2 Persons having claims against the plaintiff arising out of the same or related subject matter may be joined as defendants and required to interplead when their claims may expose plaintiff to double or multiple liability. It is not ground for objection to interpleader that the claims of the several claimants or the titles upon which their claims depend do not have a common origin or are not identical, or are adverse to or independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any of or all the claimants. A defendant under similar circumstances may obtain like relief by counterclaim. The provisions hereof are not a limitation upon the joinder of parties or causes of action.

Section 50(2) If multiple parties or multiple claims for relief are involved in an action, the court may enter a

final order, judgment or decree as to one or more but fewer than all of the parties or claims only upon an express finding that there is no just reason for delaying enforcement or appeal. In the absence of that finding, any order, judgment or decree which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not terminate the action, is not enforceable or appealable, and is subject to revision at any time before the entry of an order, judgment or decree adjudicating all the claims, rights and liabilities of all the parties.

Section 72(1) Relief from the final orders, judgments and decrees, after 30 days from the entry thereof, may be had upon petition as provided in this section. Writs of error coram nobis or coram vobis, writs of audita querela, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds of such relief heretofore available, either at law or in equity, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceeding hereunder, regardless of the nature of the order, judgment or decree from which relief is sought or of the proceedings in which it was entered. There shall be no distinction among actions at law, suits in equity and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief, or the relief obtainable.

(2) The petition must be filed in the same proceeding in which the order, judgment or decree was entered but it is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(3) The petition must be filed not later than 2 years after the entry of the order, judgment or decree. Time

during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

(4) The filing of a petition under this section does not affect the order, judgment or decree, or suspend its operation.

(5) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order, judgment or decree pursuant to the provisions of this section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order, judgment or decree but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order, judgment or decree.

(6) Any order entered denying or granting any of the relief prayed in the petition is appealable.

(7) Nothing contained in this section affects any existing right to relief from a void order, judgment or decree, or to employ any existing method to procure that relief.

Illinois Revised Statutes, 1955.

Chapter 120.

501(1) Each tract or lot of real property shall be valued at its fair cash value, estimated at the price it would bring at a fair, voluntary sale.

515 When a whole section, half section, quarter section, or one-half section, belongs to one owner, it shall

at the request of the owner or his agent, be listed as one tract, and when all lots in the same block belong to one owner they shall, at the request of the owner or his agent, be listed as a block. When several adjoining lots in the same block belong to the same owner, they shall, at the request of the owner or his agent, be included in one description, provided, however, this section shall not apply to property upon which delinquent or forfeited taxes are outstanding.

518. Whenever acreage property has been subdivided into lots and such division has been placed of record in the office of the recorder of deeds in any county, or, in the case of land the title to which is registered under the Land Titles Act, has been filed in the office of the registrar of titles for the county, the said lots shall be reassessed and placed upon the Assessor's books in lieu of such acreage property as of the first day of April immediately following the date of such recording or filing, as the case may be, of the subdivision.

523 When real property has been subdivided since the making of the general assessment, the Assessor shall from time to time correct the descriptions so they shall correspond to the subdivision, and distribute the assessment in the proper proportions among the lots or parcels into which the land shall have been subdivided; and in case of a vacation of a subdivision readjust the description of the assessment accordingly.

Illinois Appellate Court
Second District Rule 9.

Filing and Serving Abstracts and Briefs.

(1) Nine copies of the abstracts and briefs shall be filed with the clerk of the court, and 3 copies shall be served, personally or by mail, upon each adverse party who appeared in the trial court or on his attorney of record.

(2) The abstract and brief of appellant together with proof of service of copies must be filed in the clerk's office on or before 30 days after the filing of the record on appeal. In case either the abstract or brief is not filed within the time prescribed, the appeal or writ of error will be dismissed. The appellee shall file his brief, with proof of service, on or before 20 days after the due date of appellant's brief. The appellant may file a reply brief, with proof of service, on or before 10 days after the due date of appellee's brief.

(3) Upon good cause shown, but only written motion supported by affidavit filed with the clerk in accordance with Rule 5, the court, or any judge thereof in vacation, may extend the time to file the abstract or brief of any party. The order is effective as of the date of filing the motion. The court, or a judge thereof in vacation, may shorten the time to file the abstract or brief of any party, upon its or his own motion or upon the motion of a party supported by affidavit.

(4) Where a separate appeal or cross appeal has been taken, abstracts and briefs shall be filed as ordered by the court or a judge thereof in vacation on motion of any party filed with the clerk in accordance with Rule 5.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960

No. 202

DOER ANDERSON and DOROTHY ANDERSON, his wife; MONT I. ANDERSON and WANDA LEE ANDERSON, his wife; et al.,

Petitioners,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES OF McHENRY COUNTY, ILLINOIS,

Respondent.

DOER ANDERSON and DOROTHY ANDERSON, his wife; MONT I. ANDERSON and WANDA LEE ANDERSON, his wife; et al.,

Petitioners,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES OF McHENRY COUNTY, ILLINOIS, a corporation; BOARD OF EDUCATION OF McHENRY COUNTY COMMUNITY HIGH SCHOOL DISTRICT No. 156, OF THE CITY OF McHENRY, a municipal corporation; VERNON W. KAYS, County Clerk of McHenry County, et al.,

Respondents.

BRIEF FOR RESPONDENT, COUNTY BOARD OF SCHOOL TRUSTEES OF McHENRY COUNTY, ILLINOIS, A BODY POLITIC AND CORPORATE, TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS OR TO THE ILLINOIS APPELLATE COURT, SECOND DISTRICT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1960

No. 202

DALE ANDERSON and DOROTHY ANDERSON, his wife, MONT L. ANDERSON and WANDA LEE ANDERSON, his wife, et als

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COUNTY BOARD OF SCHOOL TRUSTEES OF McHENRY COUNTY, ILLINOIS,

Respondent.

DALE ANDERSON and DOROTHY ANDERSON, his wife, MONT L. ANDERSON and WANDA LEE ANDERSON, his wife, et als

Petitioners,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES OF McHENRY COUNTY, ILLINOIS, a corporation; BOARD OF EDUCATION OF McHENRY COUNTY COMMUNITY HIGH SCHOOL DISTRICT No. 156, OF THE CITY OF McHENRY, a municipal corporation; VERNON W. KAYS, County Clerk of McHenry County, HARRY C. HERENDEEN, County Treasurer of McHenry County, STANLEY H. GORNUL, County Supervisor of Assessments of McHenry County, and LESTER E. BACON, Assessor, McHenry Township, McHenry County,

Respondents.

BRIEF FOR RESPONDENT, COUNTY BOARD OF SCHOOL TRUSTEES OF McHENRY COUNTY, ILLINOIS, A BODY POLITIC AND CORPORATE, TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS OR TO THE ILLINOIS APPELLATE COURT, SECOND DISTRICT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED.

1. Whether Petitioners have filed their Petition for Writ of Certiorari in this Court within the time pro-

vided by law to confer on this Court jurisdiction to ce
tertain said Petition, and, for this purpose, reference i
made to four of the five prayers stated on page 2 of
said Petition, which are here repeated for the purpos
of convenience: (a) to review the judgment order en
tered August 2, 1957 in Case No. 35064 of the Circu
Court of McHenry County, Illinois; (b) to review the
orders entered May 1, 1959 by the Circuit Court of Mc
Henry County, Illinois, in Case No. 35064 of said Court,
allowing the motion to strike the petition filed thereu
on January 30, 1959, and the order of said Circuit Court
entered June 7, 1959, denying motions to vacate said
order of May 1, 1959; (c) to review the order of the
Illinois Supreme Court, entered September 24, 1959 i
Case No. 35501 of that Court, transferring the appeal
filed thereunder to the Appellate Court for the Second
District of Illinois (Case No. 11353 of said Appellate
Court), and (d) to review the order entered December
9, 1959 by the Appellate Court for the Second Distric
of Illinois, dismissing the appeal in said Case No. 1135
of that Court.

2. Whether in a case presented to a state court havin
jurisdiction of the parties and subject matter, wherei
an opportunity was afforded, but not availed of, to pre
sent Federal questions, and, subsequently, on collatera
attack for the first time Federal questions were pre
sented by amendment to a post-trial motion made with
out authority of law, in a petition filed after appeal
from such case were dismissed and denied for failure to
properly prosecute the same under state appellate pro
cedural law, and thereafter, such Federal questions were
included in appeals to state reviewing courts from the
trial court's ruling denying motion to vacate its orde

striking said collateral attack petition, which appeals were dismissed and stricken by state reviewing courts for failure of appellants to invoke such appellate jurisdiction in accordance with the laws of the State, so that no state court ever passed upon any Federal question, is there jurisdiction in the United States Supreme Court to entertain a Petition for a Writ of Certiorari to review the judgments and orders of the state courts.

STATEMENT OF THE CASE

Because Petitioner's statement of the case is not only inaccurate throughout, but is misleading and incomplete, it is necessary that Respondent, County Board of School Trustees of McHenry County, Illinois, a body politic and corporate, furnish this Honorable Court with a true and correct statement of the facts as they relate to the issues involved.

On November 14, 1956, County Board of School Trustees of McHenry County, Illinois, Respondent herein, filed its Petition to Condemn certain real property situated in the City of McHenry, Illinois, to acquire the fee simple title to said property under the power of eminent domain for public school purposes on behalf of the Board of Education of McHenry High School District No. 156 (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 1-5). Jurisdiction over all named parties defendant in the original Petition to Condemn and in the amendment thereto was acquired (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 6). Petitioners herein, who were defendants in the trial court, were all represented by counsel at the trial of the cause (Pet. Writ Cert. 6). No Motion to

Dismiss (Demurrer) or Traverse was filed in the trial court on behalf of Petitioners herein raising any Federal question. The jury viewed the premises sought to be taken, and the case proceeded to trial on the question of just compensation to be paid for the taking of the subject property. (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 19). Jury verdict was returned July 31, 1957, determining just compensation to owner or owners, and persons interested in the land sought to be taken, to the fee simple title thereto, the sum of $14,500.00. (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 11) Judgment order on the verdict was entered August 2, 1957. (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 14-15) Post-trial motion was filed August 30, 1957 by the Petitioners herein, moving the trial court to vacate the verdict of the jury and set aside the judgment on the verdict, and to grant a new trial for reasons therein stated. No ground urging violation of any Federal right of said Petitioners was stated in said post-trial motion. (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 15-17). Said post-trial motion was denied on September 26, 1957 (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 17). Petitioners insist in the Petition for Writ of Certiorari now before this Court, that there were three contracts for the sale of lots in the subdivision involved in the case. (Pet. Writ Cert. 7). The record shows that only one contract for the purchase of a lot in said subdivision was offered in evidence in the trial court. (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 41). The objection to the offer of proof of said alleged contract for the reason that it was void was sustained by the trial court (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 41-43). Exhibit 1, consisting of a copy of the recorded plat of subdivision of the property under consideration (erroneously stated to have been filed in the office of the Recorder of McHenry

County on January 30, 1950, but actually recorded January 31, 1956, copy of which is attached to and made part of Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. Appendix), which was admitted into evidence without objection (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 40), showing dedicated streets thereon. There is no evidence in the record that there was any acceptance of said dedicated streets by public authority, as required by Illinois law.

On November 21, 1955, Petitioners appealed to the Illinois Supreme Court (Case No. 34738 thereof) from the original condemnation trial and judgment entered therein, pursuant to the appeal section of the Illinois Eminent Domain Act (Chapt. 47, Sec. 12, Ill. Rev. Stat. 1955) (Pet. Writ Cert. 6). Said appeal was dismissed by order of the Illinois Supreme Court, entered April 18, 1958, for failure to file briefs and abstracts on time (Pet. Writ Cert. 6, 7) after Petitioners herein had been granted three extensions of time for filing of such brief and abstract (Rec. 36, Ill. Sup. Ct. 35780).

After such dismissal of the above original appeal to the Illinois Supreme Court, Petitioners herein, on August 5, 1958 filed their Petition in the Illinois Supreme Court (Case No. 34980 thereof) for Leave to Appeal within one year, under Section 76 of the Illinois Civil Practice Act, which provides, *inter alia*, that,

> "* * * notice of appeal may be filed * * * within 1 year from the entry of the order, decree, judgment or other determination, and upon a showing by affidavit that there is merit in appellant's claim for an appeal and that the * * * failure properly to prosecute an appeal which was perfected * * * was not due to appellant's culpable negligence."

On September 16, 1958, the Illinois Supreme Court denied said Petition for Leave to Appeal (Rec. 4, Ill.

June 1, 1959. (Rec. 4, Ill. Sup. Ct. 35793, Supp. Abst. Rec. 47-51). No Federal question was raised in said motion to vacate.

On July 7, 1959, two of the defendants in the original condemnation case filed a petition adopting the allegations and prayers of the above Petition filed January 30, 1959 (Rec. 4, Ill. Sup. Ct. 35793, Supp. Abst. Rec. 53-54; Pet. Writ Cert. 10). Said July 7, 1959 Petition was stricken, on motion, on July 7, 1959, and on the same day an oral motion to Vacate said striking order and the order entered June 1, 1959 striking the Petition of January 30, 1959 was denied (Pet. Writ Cert. 10).

Thereafter, on July 31, 1959, Petitioners herein filed their Notice of Appeal from the original judgment order entered August 2, 1957, from the order entered September 26, 1957 denying the post-trial motion, from the order entered May 1, 1959 granting the motion to strike the Petition filed January 30, 1959, from the order of July 7, 1959 denying the motion to vacate said order of May 1, 1959 and for other relief, from the order entered July 7, 1959 granting the motion to strike the petition of Kenneth and Betty Chance filed on the same day, from the order entered on the same day denying the Chances motion to vacate said order striking their petition, and from the order entered July 7, 1959 denying the motion of the same date of all the Petitioners herein to determine who was entitled to the money adjudged just compensation. (Rec. 4, Ill. Sup. Ct. 35793, Supp. Abst. Rec. 56-58). Thereafter, on July 31, 1959, Petitioners herein filed their Praecipe for Record asking the Clerk of the Circuit Court of McHenry County, Illinois to prepare a full and complete record of the above entitled cause (Case No. 35064, McHenry County Circuit Court incorporating by reference the transcript of the

ord filed in Illinois Supreme Court Case No. 34738 (the original appeal) and used in Case No. 34990 of said Court), (the petition for leave to appeal after dismissal of the original appeal) but setting out verbatim every affidavit, motion, notice and petition filed since April 15, 1958 and every order, judgment or decree entered thereon since April 15, 1959 (Rec. 4, Ill. Sup. Ct. 35793, Supp. Abst. Rec. 59). The appeal pursuant to said Notice of Appeal last mentioned and Praecipe for Record was filed in the Supreme Court of Illinois on September 10, 1959 as Case No. 35591 (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 14). On September 24, 1959, motion of the School Trustees to dismiss said Case No. 35591 was denied, and on the same date, on the Illinois Supreme Court's own motion, the appeal was transferred to the Appellate Court for the Second District of Illinois. On September 28, 1959 that portion of the record that accompanied the Notice of Appeal filed July 29, 1959 was forwarded by the Illinois Supreme Court Clerk to said Appellate Court. Said record was filed in the Appellate Court on September 29, 1959. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 14).

On October 28, 1959, Petitioners herein filed a motion in the Appellate Court for an extension of time to and including November 30, 1959 in which to file abstracts and briefs. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 15). Rule 9(2) of said Appellate Court provides that abstract and brief of appellant must be filed in the Clerk's office on, or before 30 days after the filing of the record on appeal (Pet. Writ Cert. 18a). Said motion was denied by the Appellate Court on November 16, 1959. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 16). On November 3, 1959, the record of the Supreme Court of Illinois, Case No. 34738, (the original appeal) was filed

in the office of the Clerk of the Appellate Court. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 15). On December 9, 1959, the Appellate Court, pursuant to its Rule 9, entered Appellate Court Case No. 11353 dismissed for failure to file abstract of record and brief and argument. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 18). On January 4, 1960, Petitioners herein filed a motion in the Appellate Court to vacate its dismissal order of December 9, 1959, and, amongst other grounds, stated that unless said order is vacated, the appellants therein will be deprived of their right to appellate review without due process of law by State action in violation of Article 2, Section 2 of the Illinois Constitution and the Fourteenth Amendment to the Constitution of the United States. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 18, 19). On January 9, 1960, the Appellate Court overruled and denied said motion. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 29, 30). Petitioners herein on January 14, 1960, filed a motion in the Appellate Court, amongst other things, to vacate its order of December 9, 1959 dismissing the appeal on the ground, amongst others, that Rule 9 of Appellate Court, Second District, as construed and applied by that Court in its order of December 9, 1959 and its order of January 9, 1960 denying a previous motion to vacate said order of dismissal is a violation of Article 2, Section 2 of the Constitution of Illinois and the Fourteenth Amendment, Section 1 to the Constitution of the United States, in that it requires the filing of abstracts and briefs before and without the filing of a complete record in the cause in a situation in which the appellants have no control over the record in violation of Section 76 of the Illinois Civil Practice Act and Illinois Supreme Court Rule 47. The motion was denied on January 18, 1960. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 31). There-

after, on February 25, 1960, Petitioners filed their Notice of Appeal as a matter of right to the Illinois Supreme Court from the order of the Appellate Court entered December 9, 1959 dismissing the appeal for failure to file abstracts and briefs as required by Rule 9, and from each order entered in the Appellate Court thereafter, including the order entered thereon denying the motion filed therein on January 30, 1960, claiming that the case involves the validity of a statute, &c. Rule 9, and the question having arisen for the first time in the Appellate Court. (Rec. 5, Ill. Sup. Ct. 35780, Abst. App. Ct. Rec. 416. On March 28, 1960, the School Trustees filed a motion in the Illinois Supreme Court (Case No. 35780) to dismiss said appeal for the reasons that said Notice of Appeal as a matter of right from the Appellate Court of Illinois, Second District, to the Illinois Supreme Court was not filed on or before February 2, 1960, as required by Section 74(3) of the Illinois Civil Practice Act; that appeal cannot be laid from any orders denying motions filed by appellants in the Appellate Court after December 24, 1959, the last day under the Appellate Court rule that a petition for rehearing could be filed, and any motions made after December 24, 1959 were to a court which had lost jurisdiction, and, therefore, no appeal can lie from any orders entered on motions after December 24, 1959, nor from any motion made between December 9, 1959 and December 24, 1959, because the only method of procuring a review of the dismissal order was by petition for rehearing, and not by motion. (Rec. Ill. Sup. Ct. 35780, 27, 31, 32). On March 30, 1960 the Supreme Court granted said motion to dismiss the appeal (Rec. Ill. Sup. Ct. 35780, 52, 53).

On March 12, 1960, Petitioners herein filed a petition in the Illinois Supreme Court under Case No. 35780

thereof for leave to appeal from the Appellate Court, Second District. (Rec. 2, Ill. Sup. Ct. 35793). On March 16, 1960, the School Trustees filed a motion to strike said petition for leave to appeal to the Illinois Supreme Court from the Appellate Court of Illinois for the reason that said petition for leave to appeal was not filed in the Supreme Court within 40 days after the judgment of the Appellate Court became final through the expiration of the time within which a petition for rehearing might have been filed in said Appellate Court (no petition for rehearing having been filed therein), as provided by Section 75 of the Illinois Civil Practice Act (Chapter 110, Illinois Revised Statutes 1959, Section 75) (Rec. 6, 9, 10, Ill. Sup. Ct. 35793). On March 30, 1960, the Illinois Supreme Court in Case No. 35793 ordered the petition for leave to appeal stricken. (Rec. 39, 40, Ill. Sup. Ct. 35793).

REASONS FOR DENYING CERTIORARI.

1. The Petition for Writ of Certiorari is not filed within the time prescribed by law as to four of the five matters referred to in the prayers of said Petition.

Title 28, U. S. C. A., Chap. 133, Sec. 2101, provides in part:

> "(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. * * *.
>
> "(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court * * *.
>
> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil

action, suit or proceeding before the Supreme Court for review shall be taken or applied for *within 90 days after the entry of such judgment or decree*. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days." (Italics supplied)

In commenting on a prior statute dealing with the same subject, this Court in *Rust Land Co. v. Jackson*, 250 U. S. 71, 76, said:

"On the eve of the argument a writ of certiorari was applied for; but as this was long after the expiration of the three months limited by § 6 of the Act of September 6, 1916, the application cannot be entertained, irrespective of whether the record shows a proper case for the allowance of that writ."

Under the above rule, the prayer of Petitioners herein to review by certiorari (a) the judgment order entered August 2, 1957 in Case No. 35064 of the Circuit Court of McHenry County, Illinois, to review (b) the order entered May 1, 1959 in said Circuit Court case allowing the motion to strike the Petition filed therein on January 30, 1959, and the order entered July 7, 1959 denying the motion to vacate said order of May 1, 1959, and to review (c) the order of the Illinois Supreme Court entered September 24, 1959 in Case No. 35501 of that Court transferring the appeal filed thereunder to the Appellate Court of Illinois, certainly cannot be entertained by this Court through Petition for Writ of Certiorari filed in this Court on June 30, 1960, pursuant to extension of time granted May 4, 1960 on motion filed April 27, 1960 extending filing date to June 28, 1960 and motion filed June 28, 1960 further extending the filing date to July 1, 1960. The date on which the first mo-

tion for extension of time to file said Petition for Writ of Certiorari, namely, April 27, 1960, to paraphrase the language of the *Rust Land Co.* case, "was long after the expiration of the 90 days limited by the statute" (Title 28, U. S. C. A., Chap. 133, § 2101(c)). Accordingly, the petition for review by certiorari of the judgment and orders above in this paragraph referred to should be denied, as the petition for such review has not been filed, nor was the motion asking for an extension of time within which to file said petition, filed within the time allowed by statute. For this reason alone, the Petition for Writ of Certiorari should be denied as to said judgment and orders of the Illinois trial and Supreme courts.

The prayers in the Petition for Writ of Certiorari filed herein (Petition page 2), in addition to the above matters for which review is asked by certiorari, asks to review an order by the Illinois Appellate Court, Second District, dismissing the appeal of Petitioners herein, pending in that Court on transfer from the Supreme Court of Illinois. Said order of dismissal was entered on December 9, 1959. (Petition page 2). For the obvious reason of attempting to avoid the time limitation for filing a Petition for Writ of Certiorari under the above statute, Petitioners, at page 2 of their Petition, state that said order "was entered on December 9, 1959, and became final on February 1, 1960, upon expiration of the term, while a motion to vacate the order of dismissal was still pending." Said statute allows 90 days after the entry of judgment or decree in which to file writ of certiorari to this Court for review of judgments or decrees. Under the heading "JURISDICTION", Petitioners state that the order of the Illinois Appellate Court dismissing said appeal was *entered* on December 9, 1959. This was a final order disposing of the case. Petitioners on March 12, 1960 filed a Petition for Leave

to Appeal "from an order of December 9, 1960 (erroneously stated to be December 9, 1960, but should have been stated December 9, 1959), dismissing the appeal to the Appellate Court for failure to file abstract and brief as required by Rule 9 of that Court, and from subsequent orders of that Court refusing to vacate the order of dismissal (Rec. 2, Ill. Sup. Ct. 35793, pp. 1, 2).

The School Trustees, Respondent herein, on March 16, 1960, filed their motion to strike said Petition for Leave to Appeal on the ground that the same was filed in the Illinois Supreme Court on March 12, 1960, and, was, therefore, not filed in said Court within 40 days after the judgment of the Appellate Court became final through the expiration of the time within which a petition for rehearing might have been filed in the Appellate Court (no petition for rehearing having been filed therein), as provided by Section 75 of the Illinois Civil Practice Act. (Chapter 110, Illinois Revised Statutes 1959, Section 75) (Rec. 6, 9, 10, Ill. Sup. Ct. 35793). On March 30, 1960, the Illinois Supreme Court considered said Petition for Leave to Appeal, the abstract of record and said motion to strike the Petition for Leave to Appeal, and ordered the Petition for Leave to Appeal stricken (Rec. 39, 40, Ill. Sup. Ct. 35793).

The grounds, appearing above, set forth in the motion to strike said Petition for Leave to Appeal were based upon the Illinois statutory time table dealing with perfecting appeals from Illinois Appellate Courts to the Illinois Supreme Court. It is obvious from the above that the Appellate Court order of dismissal, entered December 9, 1959, is the *final* order involved in that case. It is clear that by the granting of the above motion to strike the Petition for Leave to Appeal, the Illinois

Supreme Court rule is that the time in which to file such petition, is figured from the date of the entry of the order in the Appellate Court. The petitioners herein cannot, by filing petition after petition in the State Appellate Court to vacate the order entered December 9, 1959, change the rule of the Illinois Supreme Court that the time is to be figured from December 9, 1959, the date of entry by the Appellate Court of the dismissal order. Illinois treats it as the effective date under its appellate procedure, and, therefore, this Court will follow local Illinois appellate law in that regard.

This Court, in *United Gas Co.* v. *Texas*, 303 U. S. 123, 139, said:

> "With respect to the proceedings in the State courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and the decisions of the Texas courts as to the proper procedure in the trial court *and on appeal*. It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements. (citing cases)" (italics supplied)

Accordingly, the Petition for Writ of Certiorari in this case with respect to review of said December 9, 1959 order comes more than 90 days after its entry, and hence it is too late.

In *Matton Co.* v. *Murphy*, 319 U. S. 412, this Court said:

> "The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the

prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose. Would-be appellants could prolong indefinitely the appeal period, by making application to one judge within the three months and upon the denial by applying successively to other judges even after the prescribed time for appeal has ended."

Petitioners herein, by inventing a rule that the order of December 9, 1959 did not become final until February 1, 1960 "upon expiration of the term, while a motion to vacate the order of dismissal was still pending" cannot change the Illinois law that an order disposing of an appeal in the Appellate Court must be filed within the time above noted. The whole history of this litigation, as shown by the statement of the case, set forth in this brief, from the first appeal to the Illinois Supreme Court in Case No. 34738 of that Court has been one of delay after delay, motions and petitions for extensions of time on flimsy grounds, filing of new proceedings after the old ones proved to be of no avail, and threats of further proceedings. The filing of motions to vacate final judgment orders has been a much used tactic by the Petitioners herein throughout the long history of this litigation, which began with a simple condemnation case for the acquisition of land for school purposes which a jury evaluated at $14,500.00.

Accordingly, the Petition for Writ of Certiorari is filed too late with respect to sub-paragraph (d) above, which is the order entered in the Appellate Court on December 9, 1959, as well as with respect to the judgment and orders set forth under sub-paragraphs (a), (b) and (c) above.

Thus far we have shown that there is no jurisdiction to review in this case because the Petition for Writ of Certiorari has not been filed in this Court within the time provided by law except as to the matters involved in Illinois Supreme Court Case No. 35780.

We here point out that the prayers contained on page 2 of the Petition for Writ of Certiorari do not ask for a review of the order entered by the Illinois Supreme Court on March 30, 1960 in Case No. 35793 of that Court, striking the Petition for Leave to Appeal from the order of the Appellate Court of December 9, 1959 dismissing the appeal in that Court. Although said order, sustaining said motion to strike, is not included in the prayers of the Petition for Writ of Certiorari, at page 12 of said petition, under the Statement of the Case, Petitioners herein show that said Illinois Supreme Court case was filed in that Court on March 12, 1960 and raised two constitutional questions. It stated that Rule 9 of the Illinois Appellate Court, as construed and applied by said Court in its order of December 9, 1959, and subsequent orders, is a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it requires the filing of abstracts and briefs before and without the filing of a complete record in the case in a situation in which the litigants have no control over the record, and in violation of Section 86 of the Illinois Civil Practice Act and Illinois Supreme Court Rule 47, and in violation of said section of the Fourteenth Amendment because it deprives Petitioners of their right of Appellate review without due process of law.

At page 31 of the Petition for Writ of Certiorari under Argument, Point III, the statement is made that "the action of the Supreme Court in striking their petition for leave to appeal which was based on that ground

the dismissal of the appeal by the appellate court deprived them of their right to appellate review without due process of law, the State of Illinois has deprived them of their property without due process of law in violation of their federal rights under the 14th amendment or has attempted to do so." We contend that because these matters which Petitioners herein have included in the Statement of the Case and in the argument with reference to Illinois Supreme Court Case No. 35793 are not the subject of the prayer for review by certiorari (Petition for Writ of Certiorari 2) it is not properly reviewable in this case, and, in support of this position we submit the case of *Flournoy* v. *Wiener*, 321 U. S. 253, where at pag 259 this Court said:

> "It is a familiar rule, consistently followed, that upon appeal from a state court this Court will not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon, even though properly presented to and passed upon by the state courts. (Citing cases). The rule is the same in the case of applications for certiorari. Rule 38, par. 2; *General Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 179; *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 357."

Because Petitioners herein have not included Illinois Supreme Court Case No. 35793 in their prayer, as aforesaid, there is no assignment of error with respect to that case, and a reading of the conglomeration of language contained in Point III at page 28 of the Petition for Writ of Certiorari certainly does not show that there has been any designation with reference to said Illinois Supreme Court case in points relied upon.

2. No Federal question was ever presented to the state courts, nor did the state courts ever pass upon any Federal question, and, that being true, there is no jurisdiction in the United States Supreme Court to review the state courts judgments and orders by certiorari.

The foundation of Petitioners' contention that they were denied due process of law under the Fourteenth Amendment to the Constitution of the United States is based upon their claim that there are separate ownerships of tracts or parcels of land in the property condemned. They claim that three lots were sold under contract, one to the Mont Andersons, the second to the Lingenfelters, and a third to the Chances (Pet. Writ Cert. 17). They further claim that the plat of subdivision conveyed a fee simple title to certain streets to the City of McHenry, Illinois, which streets are marked on such plat as dedicated or granted to the public (Pet. Writ Cert. 16). Accordingly, they claim that there are four or five parcels of land involved, the first being all the unsold lots in the subdivision, three separate parcels constituting the lots sold under contract, and the remaining parcel consisting of streets owned by the City of McHenry (Pet. Writ Cert. 17). We now address our attention to the question of whether or not there are separate parcels involved without considering that even if there are separate parcels, that there is any Federal question involved upon which the Petition for Writ of Certiorari can be entertained by this Court. The alleged contract for the purchase of one of said lots by the Mont Andersons was offered into evidence in the trial court. Said alleged contract provided for the sale to the Mont Andersons of one lot in the subdivision at a price of $3,000.00, of which $1,000.00 was paid on the date of the execution of the agreement and the balance of $2,000.00 is payable at the rate of $25.00 per month until such time as Dorr An-

derson (who, with his wife Dorothy Anderson, are the sellers of said lot) is ready to construct for said buyers a residence (Plan No. C-825 as per separate agreement) (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec., Rec. Appendix). The Mont Anderson contract was offered in evidence in the trial court, and the attorney for the School Trustees objected to the offer of proof thereof for two reasons, first, the seller thereunder is not bound to do anything, and, therefore, it is not a contract but only an illusory promise, and second, the separate agreement to build a residence is not identified in the "contract". The trial court sustained the objection to the offer of proof (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 41-43). There is no question that the Mont L. Anderson "contract" is illegal for both of the above reasons.

In Section 104, Volume 1, Williston on Contracts, Revised Edition, the learned author says that with reference to illusory contracts:

> "Such a promise is a promise merely in form. Even if recognized by law it would impose no obligation, since the promisor by virtue of the condition always has it in his power to keep his promise and yet escape performance of anything detrimental to himself or beneficial to the promisee."

In Section 2, American Law Institute Restatement of the Law of Contracts, an illusory promise is defined as:

> "An apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise although often called an illusory promise."

Accordingly, the promise of Dorr Anderson to construct for buyer a residence (Plan No. C-825) at such time as he, Dorr Anderson, is ready as per separate agreement,

is no promise at all, nor can it serve as consideration for the alleged purchaser's promise to pay the monetary consideration agreed upon. It is an illusory promise, and the purported contract is void. The trial court was right in keeping said "contract" out of evidence. The "contract" is void for the further reason that the separate agreement is in no way identified in the written "contract" document. Therefore, the "contract" is void for uncertainty, because there is nothing in the document to make it certain. *Mode v. Whiteley*, 30 Fed. Supp 129, 130; *Cartelyou v. Barnsdall*, 236 Ill. 138, 142. The Lingenfelter and Chance "contracts" were never offered in evidence, and an examination of the same in the appendix to the abstract of the trial court record in Illinois Supreme Court Case No. 35793 shows that the same language appears in them.

Since these "contracts" were void, let us examine the claim made at page 16 of the Petition for Writ of Certiorari that they placed equitable title in the purchasers. We concede that these alleged contract purchasers were made parties along with the fee owner to the original petition to condemn. This was done under Illinois law, which holds that every person claiming an interest in land is a proper party defendant to a condemnation petition, even if the claimed interest is invalid. It should be noted, from the recording dates shown on the documents in the above Appendix, that the three "contracts" were recorded against the property, shortly before the filing of the condemnation suit in the trial court.

In *Sanitary District of Chicago v. Mansor*, 264 Ill. 256, 259, the Court said:

> "The holder of a fax title is a proper party to the condemnation proceeding, for the statute requires the petition to set forth the names of all persons in

terested in the property as owners or otherwise, as appearing of record. The object of the proceeding is to acquire the entire title free from any encumbrances or liens, and therefore every person claiming an interest in the land is a proper party. A tax deed either conveys the paramount title or it conveys nothing; and a petitioner seeking to condemn the land has a right to have that question determined, for upon it depends the important question of the ownership of the land."

In *Sanitary District* v. *Murphy*, 291 Ill. 269, 272, after holding that the holder of an invalid tax title may be made a party defendant to a condemnation petition, the Court said:

"These tax titles, if invalid, could not vest appellant with any interest in the land."

Accordingly, since the three alleged "contracts" for the purchase of lots involved in this proceeding are invalid under the law of Illinois, the purchasers did not thereby acquire any interest in the land, and the assertion in the Petition for Writ of Certiorari that they hold equitable interests is false. They have no interests, legal or equitable, and, that being so, they are not owners of separate tracts of land.

As to the claim that the City of McHenry is the owner of the streets and alleys because they were dedicated on the plat of subdivision, it is the law of Illinois that mere dedication by a plat of subdivision does not vest title to public streets in the municipality.

In *Moore* v. *City of Chicago*, 261 Ill. 56, 58, the Court said:

"The making of a plat of a subdivision and filing the same for record is a mere offer on the part of the owner to dedicate the streets and other public

grounds thereon designated to the public, and no title or rights vest in the public to such public grounds until there has been an acceptance of the offer."

There are so many authorities to this effect in Illinois that to list them would be only cumulative.

Since the evidence does not show any acceptance of the offer of dedication of streets shown on the plat of subdivision, the City of McHenry acquired no title or interest in the streets, and, because there was no doubt that said City had no such interest, it was not made a party to the condemnation petition. Therefore, the City of McHenry did not own a separate parcel or tract of land for which a separate award should have been made.

Under the above circumstances, it is clear that since the alleged "contract" purchasers and the City of McHenry had no interest in the land being condemned, the only remaining interest in the property was that of Dorr Anderson and Dorothy Anderson, who are the owners of the property by purchase in 1947 (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 56). Under Illinois statute, where title to a tract of land is owned by two or more persons, unless title is expressly declared not to be in tenancy in common, it shall be deemed to be in tenancy in common (Chap. 76, Ill. Rev. Stat. 1945, Sec. 1). Accordingly, since there is no showing in the evidence with respect to the kind of title Dorr and Dorothy Anderson held in the property under condemnation, their title is deemed to be that of tenancy in common, and, that being so, without bothering to show authority, they each held an undivided interest in one title and one tract of land. That being so, there is only one tract of land being condemned, and the entire factual basis upon which the Petitioners herein base their claim falls. The only parties

having an interest in the land condemned are Dorr and Dorothy Anderson. They appeared at the trial of the case and presented testimony in the trial court. They cross-examined the School Trustee's witnesses and presented their witnesses. Their counsel presented arguments, and the jury returned a verdict upon which the Court entered a judgment order.

In *Pittsburg, etc.* v. *Backus*, 154 U. S. 421, 426, 427, this Court said:

> "A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect."

The Andersons have been afforded due process of law. They do not need any special rule or standard in order to get the award deposited for their use with the County Treasurer. None of the Petitioners asked in the trial court for separate verdicts as to the claimed separate parcels, and, since we have seen above that there were no separate parcels, it is clear that they did not so ask for separate verdicts because there were no separate parcels, but only one parcel, and, under those circumstances, the single verdict for the single tract involved in the proceedings was correct.

The claim at page 20 in the Petition for Writ of Certiorari that the County Treasurer is unable to pay the award deposited with him, because he has no way of knowing who is entitled to receive it, is incorrect. The only party having an interest is Dorr and Dorothy Anderson, as tenants in common, and the County Treasurer can pay

money to them according to their rights as tenants in common.

We call the Court's attention to the fact that a search of the entire trial court record fails to show that the question of the Fourteenth Amendment to the Constitution of the United States was ever raised in the trial court. The recognized way to raise legal objections, under the law of Illinois, to a petition to condemn, is by motion to dismiss (demurrer) or by traverse.

In *O'Hare v. C. M. & N. R. R. Co.*, 139 Ill. 151, before the impaneling of the jury to assess compensation, appellant sought to orally traverse the allegations of the petition to condemn, and moved that the question of the necessity of the appropriation of appellant's property, and whether the parties were unable to agree to be submitted to the jury. On appeal, the Court upheld the trial court's denial of the motion. At page 159, the Court said:

> "* * * upon petition filed setting up these jurisdictional facts, and otherwise complying with the statute, authorizes a jury to be impaneled to ascertain the just compensation to be made to the owner for the property proposed to be appropriated * * *. We held in *Smith v. Chicago and Western Indiana Railroad Co.*, 105 Ill. 511, that no answer or other formal pleading is contemplated or proper. *It was not, however, intended to be held that the allegations of the petition could not be traversed, or that the averments therein were conclusive upon the land owner.*" (Italics supplied)

In *Department of Public Works and Buildings v. Lewis*, 344 Ill. 253, the Court said that if a petition to condemn does not contain the statutory requisites, the property owner has the undoubted right to contest the right to condemn, and this he may do by motion.

Accordingly, the two last cases are authority for the proposition that a motion to dismiss reaches jurisdictional defects appearing on the face of the condemnation petition, and that a traverse reaches matters which will defeat condemnation jurisdiction, but not appearing on the face of the petition. In any event, employment of either a motion to dismiss or a traverse is necessary to make jurisdictional attack upon a petition to condemn. To the same effect, see *United States v. Nudelman, et al.*, 104 Fed. 2d 549, cert. denied 308 U. S. 589; *Chicago Housing Authority v. Berkson*, 415 Ill. 159.

The statement at page 21 in the Petition for Writ of Certiorari that the Federal rights of the owners under the Fourteenth Amendment, to the Constitution of the United States, Section 1, are violated, because no rule is given and none exists by which the proportionate share of each owner in the award, *i. e.*, just compensation, can be ascertained so that the award fixes no rights and binds no one and has no effect whatsoever, is untrue. We have seen above that there are no proportionate shares in the award, but only one interest in the land involved. However, even if there were multiple interests involved, so that it would be improper to condemn without setting forth the separate parcels involved, if there were separate parcels, then because under the above Illinois authorities, including the *Nudelman* case where a condemnation was brought in a Federal Court under Illinois condemnation procedure under a conformity act, the lack of due process under the Fourteenth Amendment was not pleaded in a traverse or motion to dismiss, the objection was never passed upon the by the trial court before it entered the judgment order. Such lack of due process of law is not set forth in the post-trial motion (motion for new trial) (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 15, 16), and, under these circumstances, is waived.

Under Illinois law, alleged error in the trial which is not raised upon written motion for a new trial is waived. *People* v. *Clark*, 9 Ill. 2d 46, cert. denied, 352 U. S. 1002. Section 68.1 of Chapter 110, Illinois Revised Statutes, 1957, provides that relief desired after trial in jury cases or for a new trial must be sought in a single post-trial motion, and that the post-trial motion must contain the points relied upon particularly specifying the grounds in support thereof, and that a party may not urge as error on review of the ruling on his post-trial motion, any point, ground or relief not particularly specified in the motion. *McKinney* v. *Cratty*, 18 Ill. App. 2d 561, 563.

Up to this point, no Federal question was raised in the many proceedings. The trial court case was appealed to the Illinois Supreme Court in Case No. 34738 thereof, which dismissed the appeal for failure, after three extensions of time were granted, to file briefs and abstracts on time. (Rec. 36, Ill. Sup. Ct. 35780). This dismissal was ordered under Illinois procedural appeal law, and did not involve the passing upon by the Illinois Supreme Court of any Federal question. The Petition for Leave to Appeal within one year in Case No. 34990 of the Illinois Supreme Court was also dismissed on Illinois procedural grounds. No Federal question was passed on in this case by the Illinois Supreme Court.

The petition filed thereafter on January 30, 1959 in the trial court to have the entire proceedings declared null and void was stricken on motion of the School Trustees for reasons involving only local Illinois law, and not on the basis of any Federal question. In said petition of January 30, 1959, for the first time in the many proceedings involved, the Petitioners, without authority of law, amended the post-trial motion which was previously

denied by the trial court, and, it was in the record when the appeal was dismissed by the Illinois Supreme Court in its Case No. 34738, and, also in the record in Illinois Supreme Court Case No. 34990, both of which were dismissed by the Illinois Supreme Court on procedural grounds, as aforesaid. Said amendment to the post-trial motion raised the issue of violation of the Fourteenth Amendment to the Federal Constitution.

The ground in the motion to strike the January 30, 1959 petition relating to said amendment of the post-trial motion, was that under Illinois law, Section 68.1(3), of the Illinois Civil Practice Act (Chapter 110, Illinois Revised Statutes 1957, Section 68.1(3)), post-trial motions must be filed within 30 days after entry of judgment or discharge of the jury. We noted in the statement of the case that the amendment to the post-trial motion raising the Fourteenth Amendment to the Federal Constitution was made in the petition filed January 30, 1959, which was more than 30 days after the entry of judgment and more than 30 days after the discharge of the jury. The order of the trial court striking the petition of January 30, 1959, so far as the Federal question of violation of the Fourteenth Amendment to the Constitution of the United States as raised by the aforesaid amendment was concerned, was not decided or passed upon by the trial court, and was not considered by it. The question was not presented in time under the Illinois statute in the premises, and, therefore, the ruling involved in allowing said motion to strike necessarily was on an Illinois procedural ground, namely, that the amendment to the post-trial motion came too late and was therefore of no effect, and, that being so, there was no decision in those trial court proceedings on any Federal question.

At page 30 of the Petition for Writ of Certiorari filed in this case, it is stated by Petitioners that this Court has a duty to inquire whether the action of the trial court in denying Petitioners any relief by striking their petition to vacate the judgment in the eminent domain proceedings, which raised the question that the State of Illinois had, in violation of their Federal rights under the Fourteenth Amendment to the United States Constitution, deprived them of their property without due process of law, or was attempting to do so by refusing to vacate the order of striking. It is obvious that this refers to the order of the trial court striking the petition filed January 30, 1959 to declare the entire proceedings in the condemnation case null and void. We have shown above that because the claim of violation of the Fourteenth Amendment was contained in an amendment to the post-trial motion, not permitted under Section 68.1(3) of the Illinois Civil Practice Act, the Court in that case did not pass upon the Federal question, but the order striking the question was merely on the ground that the amendment raising the due process question violated Illinois procedural law, and hence, the order striking the petition of January 30, 1959 did not pass upon any Federal question. Under these circumstances, it cannot be truthfully said that because of said order of the trial court, Petitioners were prevented by an Illinois court from raising a Federal question; if there is any prevention involved, which we do not concede, the Petitioners themselves prevented a passing upon the Federal question by the trial court before which the January 30, 1959 petition was presented, by not raising the Federal question in the original condemnation case by motion or traverse, as required under Illinois procedural law. They could have raised the Federal question then, but did not, and, even if they had

raised the Federal question properly in a motion or traverse, their appeal from the original condemnation case was dismissed, as we have shown above, because the briefs and abstracts required to be filed were not filed in time, even after three extensions of time. This, we said above, and we here repeat, was a dismissal under Illinois procedural law.

The statement at page 30 of the Petition for Writ of Certiorari that the action of the Illinois Supreme Court in transferring the appeal to the Illinois Appellate Court, whereas, it should under Illinois statute have remained in the Supreme Court, was in violation of Petitioner's Federal rights under the Fourteenth Amendment, because its prevented a review of the order striking the January 30, 1959 petition, is untrue. Their claim of lack of due process under the order of transfer is fallacious. It could not have denied them due process of law, because we have seen above that the petition of January 30, 1959 was in itself a petition to vacate all of the proceedings in the condemnation case to date, including the judgment order entered in the trial Court on August 2, 1957 awarding just compensation of $14,500.00. Also, there was a motion to vacate the order striking said petition of January 30, 1959.

Illinois law holds that an appeal from a motion to vacate a judgment in a case does not involve an appeal from the merits of the case, but is an appeal from the order denying the vacating of the judgment or decree. See *Clasen* v. *Ripley*, 407 Ill. 350, where at pages 351-2, the Illinois Supreme Court referred to *Carnes* v. *Quinn*, 358 Ill. 446, where the Court held that an appeal from the denial of a motion to vacate a decree of the trial court did not involve the merits, but

> "The question raised does not go to the merits but is only a question of practice. When questions of practice, only, are raised, the appeal must be taken to the Appellate Court."

and not to the Illinois Supreme Court. To the same effect, see *McCarthy* v. *McCarthy*, 6 Ill. 2d 42.

In the event Petitioners had succeeded in their appeal from the order striking their petition filed January 30, 1959, the only order which the Illinois reviewing court could have entered, would be to remand with directions to vacate the order sustaining the motion to strike brought under Section 72 and various other sections of the Illinois Civil Practice Act. In this appeal the Court could not have passed upon the merits involved in the January 30, 1959 petition, but only upon the propriety of the trial court's striking the same. This, therefore, involves only a question of Illinois practice. The Court did not prevent a review of any Federal question, because it could not have done so. The order transferring from the Supreme Court to the Appellate Court was merely based upon the fact that the review sought was from a procedural question, viz., the validity of the striking order, and not any substantive question. Again, we find that Petitioners are in error when they claim that they are denied a chance to present the question of due process of law through the Supreme Court's transferring the case to the Appellate Court.

Again, at page 30 of the Petition for Writ of Certiorari, Petitioners herein claim that the dismissal order entered by the Appellate Court for failure to comply with Rule 9 of said Appellate Court prevents them from having the question of due process presented, is also false. We have seen above that the appeal, there under consideration, was

from the order striking the petition of January 30, 1959, and that said appeal was based upon Illinois procedure, not from a ruling on the Fourteenth Amendment to the Constitution of the United States. Rule 9 itself is a procedural rule. It states when briefs and abstracts should be filed. Even if they had been filed, no Federal question of the Fourteenth Amendment or any other substantive question would be passed upon by the Appellate Court because that appeal itself was on a procedural ground. It is amazing that anybody can claim that a dismissal of any appeal not involving any Federal question can prevent a review of such question. It was not involved in the appeal, and, therefore, it can not be, by the very nature of the appeal, passed upon by the reviewing court. The same is true with respect to the Petition for Leave to Appeal from the above order of the Illinois Appellate Court to the Illinois Supreme Court, and the appeal as a matter of right from the Appellate Court to the Supreme Court. Both said Petition for Leave to Appeal and said so-called appeal as a matter of right are based upon the Appellate Court's right to dismiss under its procedural Rule 9. There was no prevention in either of these last two Illinois Supreme Court cases from raising the question of due process of law. The question of due process of law was never presented to the Court in either of these two cases, and, even if the Court had permitted the appeal under the Petition for Leave to Appeal or had heard the appeal under said appeal as a matter of right, the Court would have passed upon the validity of the order of the Appellate Court in dismissing the appeal under its procedural Rule 9; in other words, the Court would have decided whether or not, as a matter of procedure, the Appellate Court was correct in dismissing the case for procedural non-compliance with its Rule 9.

Since the question of due process of law under the Fourteenth Amendment could never have been passed upon by the trial court under the January 30, 1959 petition because, as we have shown above, the amendment to the post-trial motion came too late under Illinois procedural law, any appeal thereafter could not involve deprivation of Petitioner's rights under the Fourteenth Amendment. The trial court never passed upon it, and could not pass upon it, and, since that was true, there never could have been a review of that which was not passed upon, because Petitioners, themselves, prevented it from being passed upon by not complying with Illinois procedural law. They should have raised the Federal question of the Fourteenth Amendment by motion or traverse to the petition to condemn. They did not. Therefore, they waived the right to raise the issue.

Not once in this case, stretching over a period of four years, with its myriad petitions, motions, and other proceedings, including appeals and petitions for leave to appeal, did Petitioners ever properly present to the Illinois courts any Federal question. They never presented the question of deprivation of their rights under the Fourteenth Amendment, and, that being true, it was never, and could never be passed upon by any Illinois court under the pleadings presented.

It is a new thought, the invention of the fertile mind of Petitioners' counsel, that a dismissal under Rule 9 of the Appellate Court in any way involves denial of due process of law. See prevously cited case of *Pittsburg, etc*, v. *Backus*, 154 U.S. 421, 426-7, for the proposition that

> "A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due

process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect."

We have previously shown that in the original condemnation trial there was a service of summons, an opportunity to be heard, the parties were represented in the trial by counsel, evidence against them and for them was presented before a court and jury, there was full opportunity to cross examine all witnesses presented against the Petitioners, there was no objection to any of the instructions to the jury, and there was no valid post-trial motion (motion for new trial) presented raising a Federal question.

In *Ohio v. Akron Park District*, 281 U.S. 74, 80, this Court said:

> "As to the due process of law clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, *the right of appeal is not essential to due process provided that due process has already been accorded in the tribunal in the first instance.* *McKane v. Durston*, 153 U.S. 684, 687; *Pittsburg, etc. v. Backus*, 154 U.S. 421, 427; *Reetz v. Michigan*, 188 U.S. 505, 508; *Rogers v. Peck*, 199 U.S. 425, 435; *Standard Oil Co. of Indiana v. State of Missouri* 224 U.S. 270, 280. The opportunity afforded to litigants in Ohio to contest all constitutional and other questions fully in the Common Pleas Court and again in the Court of Appeals *plainly satisfied the requirement of the Federal constitution in this respect and the State was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy.*" (italics supplied)

The Petitioners in the case at bar had the opportunity to raise the question of the Fourteenth Amendment to the

Constitution of the United States by traverse or motion to dismiss before the case was heard by the trial court and jury on the question of just compensation, but they failed to do so, and, as this Court said in *Honeyman v. Hanan*, 302 U.S. 375, 378:

> "The Federal Constitution does not undertake to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure gives reasonable notice and affords opportunity to be heard before the issues are decided."

Illinois procedural law, allowing traverse and motion to dismiss to raise legal questions in eminent domain proceedings, is the method adopted by Illinois for that purpose. Illinois condemnation law in providing for service of summons and for a complete hearing in condemnation cases before the issues in the case are decided, affords, and in this case, afforded Petitioners herein with a fair opportunity to present all questions of legal rights involved. The fact that they did not choose, at the proper time afforded to them under Illinois law to raise the question of the Fourteenth Amendment to the Federal Constitution, does not mean that they have not had due process of law under the Fourteenth Amendment.

We have seen above that ample opportunity was given to the Petitioners in the case at bar to present the question of due process of law under the Fourteenth Amendment to the Federal Constitution in the trial court, but they did not avail themselves of that opportunity. We have further shown above that in the myriad appellate proceedings involved, all of which were dismissed because of non-compliance with Illinois procedural law, the question of the Fourteenth Amendment could not have been ever presented for review, nor was it ever properly pre-

sented for review or passed upon in any of said appellate proceedings. As was stated by this Court in the leading case of *John* v. *Paulin*, 231 U.S. 583, 585:

> "As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev. Stat., § 709; Judicial Code, 237. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.
>
> "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan* v. *Bransford*, 139 U.S. 197; *Brown* v. *Massachusetts*, 144 U.S. 573; *Jacobi* v. *Alabama*, 187 U.S. 133; *Hulbert* v. *Chicago*, 202 U.S. 275, 281; *Newman* v. *Gates*, 204 U.S. 89; *Chesapeake & Ohio Railway Co.* v. *McDonald*, 214 U.S. 191, 195."

And, again, in the same case, the Court said at pages 586-87:

> "Thus it appears that nothing was decided but the preliminary question of the court's jurisdiction to pass upon the controverted matters shown in the record, and that this question was resolved according to what the court deemed to be the true construction and effect of applicable provisions of the constitution and laws of the State. In short, the judgment of dismissal turned entirely upon a question of local law.

"As particularly apposite, we quote the following from the opinion in *Neaman* v. *Gates*, *supra*, a case in which this court declined to review a like judgment of dismissal by a state court:"

"'Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such a question, when rendered by the highest court of a State in which a decision in the suit could be had, and as for the want of a proper appeal no final judgment or decree in such court had been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.'"

The case at bar is parallel to the *John* v. *Paullin* case. The question of due process of law under the Fourteenth Amendment was not raised, and was not presented in the petition filed in the trial court on January 30, 1959 in the manner required by Illinois procedural law. Therefore, it was never passed upon in any trial court, and was never, under Illinois law, presented to, or passed upon, by any Illinois reviewing court. To paraphrase the language of the Court in *John* v. *Paullin*, *supra*, in legal effect the case stands as though no appeal had ever been taken from the judgments rendered in the original proceeding in the trial court and in the January 30, 1959 proceeding in the trial court. The question of due process of law was never passed

upon in all the proceedings involved and presented to this Court in the Petition for Writ of Certiorari. Hence, there is no ruling of any Illinois court with respect to the Fourteenth Amendment to the Constitution of the United States to be reviewed by this Court, and, that being so, there is no Federal question involved, and the Petition for Writ of Certiorari must fail.

SUMMARY OF ARGUMENT.

Under Title 28, U.S.C.A. Chap. 133, Sec. 2101(c), a petition to this Court to review by certiorari judgments of a state court shall be filed in this Court within 90 days after the entry of such judgments in the state courts, or within any extension of such period of time, not exceeding 60 days. This Court has held that any such petition filed thereafter cannot be entertained. The Petition for Writ of Certiorari was not filed within the permitted time, nor within the extended time as to the orders and the judgment shown in Question 1 under Questions Presented in this Brief, and for this reason alone, said Petition should be denied as to said orders and judgment.

Under the ruling of this Court announced in *Flournoy v. Wiener*, 321 U.S. 253, 259, since there was no request in the Petition, to review by certiorari, the order entered March 30, 1960 by the Illinois Supreme Court in its case number 35793, striking the petition for leave to appeal therein, which order was entered under Illinois State procedural law, this Court will not consider that case.

In answer to Petitioners' claim that they were denied due process of law under the Fourteenth Amendment to the Federal Constitution because there was a single award of compensation for the taking by eminent domain of several, not one, parcels of land and that Petitioners

were thereby unable to determine the part of such award applicable to each separate parcel, we showed that there was only one parcel of land involved; we further showed that claimed interests of alleged contract purchasers gave them no interest, legal or equitable, in the land because said "contracts" were void, being illusory and incomplete; in addition, the interest of the City of McHenry as an asserted separate owner of part of the land because of ownership of title to streets in the subject property, which streets were dedicated in said land was non-existent because under Illinois law, dedication by plat of subdivision conveys no title to streets unless there is an acceptance of the dedication by the public. No acceptance was shown in evidence, hence, the City had no interest. We showed that therefore there was only one parcel and one title, the owners of which, as tenants in common, were the sole parties interested therein and the entire award belonged to them.

We further showed that the question of due process under the Fourteenth Amendment to the Federal Constitution was not raised by Motion to Dismiss or Traverse to the original petition to condemn, as required by Illinois procedural law, and was therefore waived, so that question was not passed upon by the trial court. Because of non-compliance with Illinois procedural law, both in the trial and reviewing courts of Illinois, no Federal question was ever presented to, nor passed upon, by any Illinois court. No Illinois reviewing court had the opportunity to pass on the Fourteenth Amendment to the Federal Constitution; because all appeals taken were stricken or dismissed for Petitioner's failure to perfect them as required by Illinois procedural rules governing appellate practice.

The claim of Petitioners that the Illinois courts prevented them from securing any ruling on said Fourteenth

Amendment is untrue, because Petitioners, themselves, never presented the question to any Illinois court due to their own fault in not complying with the procedural requirements for presentation of the question. This situation throws the case squarely within the rule announced by this Court in *John* v. *Paullin*, 231 U.S. 583, to the effect that the case stands as though no appeal had ever been taken from any ruling by the state court on the question of said Fourteenth Amendment, and that being so, there is no ruling of the state court on any Federal question for review by certiorari in this Court.

CONCLUSION.

For the reasons herein set forth, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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